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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 407

GEORGE B. MONROE, RECEIVER, PETITIONER,

vs.

LOUIS RAPHAEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1932

CERTIORARI GRANTED NOVEMBER 7, 1932

(37,104)

(37,104)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, first circuit	1	1
Caption (omitted in printing)	1	
Record from district court of the United States, District of Massachusetts	1	1
Agreed statement as to record on appeal	1	1
Affidavits of sureties on bond of Harold A. Dempsey	5	4
Petition for leave to institute proceedings upon bond	9	7
A—Offer of Harold A. Dempsey to purchase assets, etc.	12	10
B—Bond of Harold A. Dempsey	15	13
Ancillary bill of complaint	16	14
Interlocutory decree for injunction, etc	21	18
Final decree on ancillary bill of complaint	23	20
Receiver's petition for contempt	23	21
Order on petition for contempt	29	26
Motion of receiver to amend order allowing Louis Raphael to bring suit in State court, etc	30	27
Final decree, State court	31	28

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	Original	Print
Restraining order and order of notice	34	32
Plea of Louis Raphael	36	33
A—Stipulation waiving motion to dismiss in State court	42	38
B—Master's report, State court	42	39
C—Motion to recommit to master, State court	52	49
D—Notice to amend defendant's answer, State court	53	49
Hearing	54	51
Transcript of hearing on motion to modify order, etc	54	51
Order for injunction, etc	63	59
Claim of appeal and allowance thereof	64	60
Petition for appeal	64	60
Assignment of errors	65	61
Bond on appeal (omitted in printing)	67	
Præcipe for transcript of record	68	63
Citation and acceptance of service thereof (omitted in printing)	69	
Certificate of clerk (omitted in printing)	70	
Memorandum re orders enlarging time	70	64
Opinion, Bingham, J	71	64
Dissenting opinion, Morton, J	79	72
Final decree	82	75
Clerk's certificate (omitted in printing)	82	
Order allowing certiorari	83	75

[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3293, Equity Docket

J. B. Hirshfeld & Co., Inc., et al., Plaintiffs,

v.

The Monroe Stores, Inc., Defendant

Appeal of Louis Raphael

Agreed Statement as to Record on Appeal by Louis Raphael—Filed February 6, 1932

On the appeal by Louis Raphael in the above-entitled cause, it is hereby stipulated and agreed that certain papers and proceedings in said cause, hereinafter specified, shall not be printed in extenso as part of the record on said appeal, but that in lieu thereof the following summaries and statements concerning such papers and proceedings and the contents thereof shall be printed by the clerk as part of the record on said appeal:

A. The original bill of complaint in said case was filed in said United States District Court for the District of Massa- [fol. 2] chusetts on July 14, 1930. The plaintiffs named in said bill are J. B. Hirshfeld & Co., Inc., Le Roi Hosiery Company, James H. Dunham Company and Waterproof Novelty Company. The defendant in said bill is Monroe Stores, Inc., a Massachusetts corporation having an usual place of business in Massachusetts.

Said bill alleges that the four plaintiffs were creditors of the defendant for goods sold and delivered in sums aggregating $5,246.58; that the total liabilities of the defendant corporation were in excess of $95,000; that the creditors of the defendant were numerous; that the defendant was engaged in the business of operating chain stores for the sale of dry goods; that the defendant's assets exceeded its liabilities; that its assets were so invested that it could not pay its debts as they matured without a great sacrifice in

value; that the creditors were pressing for payment; that attachments had been made and that others were threatened; that a receiver was necessary in order to conserve its assets and to avoid threatened attachments, waste and loss. The bill prayed for the appointment of a receiver. Said bill was filed by Andrew J. Aldridge, Esquire, as attorney for the plaintiffs.

B. An order of notice dated July 14, 1930, was issued on said bill of complaint directing said defendant, Monroe Stores, Inc., to show cause why a receiver should not be appointed. Said order of notice was returnable on July 21, 1930. Due and sufficient service was accepted thereon by Thomas W. Morris, Esquire, of Boston, as counsel for the defendant.

C. The answer of the defendant Monroe Stores, Inc., to said bill of complaint was filed on July 29, 1930. The answer admitted all the allegations of the bill and assented to the prayer for the appointment of a receiver. The answer was filed by said Thomas W. Morris, Esquire, as attorney for said defendant, Monroe Stores, Inc.

D. On July 23, 1930, a decree was entered by said District Court in said equity proceeding, appointing George B. Monroe of Quincy, Massachusetts (the treasurer of Monroe Stores, Inc.), as receiver, with authority to carry on the [fol. 3] business of said defendant corporation. On the same day said George B. Monroe qualified as receiver by filing a bond in the sum of ten thousand (10,000) dollars.

E. On July 28, 1930, upon a petition filed that day by said receiver, an order was entered authorizing him to employ said Andrew J. Aldridge, Esquire, and Thomas W. Morris, Esquire, as counsel for the receiver.

F. On November 10, 1930, said receiver filed a petition for leave to advertise for sealed bids for all the assets and property of the defendant corporation, including cash on hand, merchandise, fixtures, good will and all other assets. An order allowing said petition was entered on November 10, 1930.

G. On November 25, 1930, Harold A. Dempsey filed an offer to purchase said assets mentioned in said receiver's petition, a copy of which offer is annexed as "Exhibit A"

to the petition entitled "Petition by Louis Raphael, a Creditor of Said Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond", said petition being printed in extenso as part of this record on appeal and being referred to in the præcipe on appeal as document No. 3.

H. The statements concerning said offer and concerning the other proceedings set forth in the petition entitled "Petition by Louis Raphael, a Creditor of Said Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond" and numbered 3 in the præcipe are true, and the copies of the offer and of the bond thereto annexed as "Exhibits A" and "B" are true and correct copies of said respective documents. On March 23, 1931, an order was duly entered by said United States District Court for the District of Massachusetts (Lowell, J.), allowing said petition.

I. In pursuance to said order entered on March 23, 1931, the appellant as relator, did on April 9, 1931 file a bill in equity in the Superior Court for the County of Suffolk entitled "United States of America ex rel., Louis Raphael, Plaintiff, v. Harold A. Dempsey, Clifford S. Drake and Louis F. Buff, Defendants", and numbered 37782 Equity in said court. Said defendants Dempsey, Drake and Buff were respectively the principal and sureties on said bond. Said bill seeks to reach and apply, under Massachusetts G. L. Chap. 214, Sec. 3, Clause 7, certain shares of stock and other [fol. 4] property of said defendants therein named to the payment of the amount of the dividend due the appellant on his claim as a creditor of said Monroe Stores, Inc., which had been duly proved and allowed in the sum of thirty-five thousand dollars ($35,000) in said equity receivership of Monroe Stores, Inc. in said United States District Court. The statements set forth in the Plea of Louis Raphael (No. 11 in the præcipe on appeal) with respect to said proceedings in the Suffolk Superior Court in said case of United States of America ex rel. Louis Raphael v. Dempsey et al., and with respect to the proceedings in said United States District Court in said case of J. B. Hirshfeld & Co., Inc., et al. v. Monroe Stores, Inc., are true.

J. In the ancillary bill of complaint, referred to as document No. 5 in the præcipe, the amount due creditors as dividends on claims duly proved and allowed in the re-

ceivership proceedings is alleged in the fourth paragraph thereof to be $33,026.87. The attorney for the receiver who drafted this ancillary bill of complaint in computing said amount included as a part thereof the sum of $9,300 as the balance of the dividend due on the claim of the appellant, Louis Raphael.

K. In pursuance to the order dated October 21, 1931, entered on the petition for contempt, which order is referred to as document No. 8 in the præcipe, Clifford S. Drake and Louis F. Buff, the sureties on the bond, are paying to Andrew J. Aldridge, Esquire, as attorney for the receiver, one thousand dollars ($1,000) per month.

Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael, Appellant. A. J. Aldridge, Attorney for George B. Monroe, Receiver.

The bill of complaint in this cause was filed in the clerk's office on the fourteenth day of July, A. D. 1930, and was duly entered at the June Term of this court, A. D. 1930.

[fol. 5] In United States District Court

Affidavits of Clifford S. Drake and Louis F. Buff, Qualifying as Sureties on Bond of Harold A. Dempsey—Filed with Bond, December 2, 1930

Affidavit of Clifford S. Drake—December 2d, 1930

I, Clifford S. Drake of North Hampton in the State of New Hampshire and residing in Cambridge in the County of Middlesex, Massachusetts and having a usual place of business in Boston, Massachusetts hereby certify that the attached hereto is a complete list of my property.

It will be noticed that my free and clear real estate at assessed values totals $80,255.00 and that I have an equity in three pieces of real estate amounting to $12,600 at assessed values.

I also own outright not less than $75,000 worth of tax titles. I own first mortgages amounting to $5,000 and I have good stock exchange collateral worth $29,000.00 making total assets of not less than $201,855.00 and my lia-

bilities do not exceed $43,600.00 making my net worth not less than $158,255.00.

Clifford S. Drake.

Boston, Mass., Dec. 2, 1930.

Subscribed and sworn to before me. Edith G. Rollins, Deputy Clerk United States District Court, Mass. Dist.

List of Properties—December 1, 1930

		Assessment
Boston	Albany & Curve St., $3 per sq. ft.	$2,400
"	23 Willard Street, 1324 Feet	4,000
"	57 Fay Street, 808 feet	2,500
So. Boston	155 Gold St. corner Harding Ce. 736 ft	400
Charlestown	2 Auburn Avenue, 1541 sq. ft.	400
"	61 Russell Street, 1484 ft. (land)	2,300
"	4 Roughan Road, three-family	3,200
"	Lawrence Avenue, 7507 feet	400

[fol. 6]

Roxbury	Lot 103 Fisher Ave., 5005 ft	1,300
"	Lot 102 Fisher Ave., 4306 ft	1,100
Billerica	Lots 47-52 Riverbank Terrace, bungalow	200
Braintree	Harbor Villa Ave., Lots 49-53, 8000 ft	730
"	Trefton Drive, Lots 160-1, 10,000 ft	700
Cambridge	441 Concord Ave., 10352 ft., land	1,500
Chelsea	30 Walnut Avenue, 1058 ft., building	3,000
Dedham	Riverside Drive, Lots 40-1 Pine Heights 7631 ft	700
"	Oak St., Lot 77, 6080 ft. (betterment asst.)	600
Everett	Vale St., Lots 101-3	1,700
Lowell	Lot 9 Mt. Grove St. cor 6th St. 6320 ft	500
"	Lot 6-7 Mt. Grove St., 21526 ft. Pawtucketville	1,500
"	Lots 14-18 Fenwick St., 2380 ft	3,900
"	Lot 1 Tanner St., 9094 ft	1,350
Medford	Rock Glen Circle, 9776 ft., Lot 219	500
"	Lot 87 Codding Ave., 3405 ft	300
"	Lot 85 Codding Ave., 3152 ft	300
"	Lot 82 Codding Ave., 3215 ft	400
"	Lot 172 Saunders Street, 3883 ft	200
"	Lot 15 Lewis St., 2607 ft	300
"	Lot 118 Fells Ave., Granite Rd., 4228 ft	250
"	Lincoln St. No. 49	3,900
North Hampton	Summer residence	10,000
Quincy	112 Island Ave., Plot 22-3 1300 ft. building	1,500
"	Lot 81 Beebe Road, 2500 ft	200
"	Lot 79 Beebe Road, 2500 ft	200
"	Minahans Lane & Forest St., 12952 ft. 5 room house	1,000
"	Lots 361-2 Division St., 5115 ft	400
Revere	Lots 233-5 Savage St., 6000 ft	500
"	Crest Avenue, adjoining #16, 5522 ft	1,500

[fol. 7]

Saugus	787 Broadway, 189000 ft. building	3,000
"	Broadway corner Treher St., 40x105	800
"	Lot A-202 Saugus Ave., 3904 ft	275
"	Lots 78-9 Palmettos Street, building	700
"	30-42-44 Bristow St., 6 lots 15000 ft. blds	4,300
"	Lots 163-4 Sqan and Raven Rd., 4312 ft. 2794 ft.	800

			Assessment
Saugus	Lots 148-150 Dewey St		825
Watertown	Lot 7 Orchard St., 1782 ft		100
"	Lot 6 Orchard St., 2030 ft		100
"	Lot 79 Bradshaw St., 1714 ft		100
"	Lot 78 Bradshaw St., 1726 ft		100
"	Lot 78A Bradshaw St., 1503 ft		100
Winthrop	Lot B River Road, 3380 ft		450
Haverhill	Lots 163-4 Brook St. 12367 ft		1,650
"	Lots 10-11-12 Seventeenth Ave., 12516 ft		725
"	Lot 13 Primrose St. 3888 sq. ft		150
Waltham	Sterling Road 5000 ft		250
Cambridge	79 Upland Road		7,800
Everett	45 Fuller St. Sold $2200. No mortgages		2,200
			80,255
Cambridge	134-136 Fayerweather St	$7,800	
	56-68 Saville St	7,800	
	86-88 Fitchburg St	10,000	
		25,600	
	3 mortgages aggregating	13,000	
		12,600	12,600
			92,855

[fol. 8] AFFIDAVIT OF LOUIS F. BUFF

I, Louis F. Buff, of 34 Alveston Street, Jamaica Plain, Massachusetts, President of the Buff & Buff Manufacturing Company, Manufacturers of Surveying Instruments for use of civil engineers, etc., offer myself a surety in the sum of one hundred thousand dollars ($100,000.00), in the above case, and on oath depose and say that I am more than twenty-one years of age, and that I have real estate in Boston, Massachusetts, consisting of a

		Equity
Brick building,—802 Washington Street,		
Assessed value	$89,000	
Mortgage	40,000	
		$49,000
11,200 feet of land,—419 Columbus Ave	134,000	
	40,000	
		94,000
Seven brick buildings—3 stores each—bounded by Vale, Thornton and Fuldar Sts	135,000	
	82,000	
		53,000
150,000 7% Preferred Stock of the Henrici Laundry Machinery Co., of 61 West Selden St., Dorchester, Mass. (total issue of said stock is $165,000)		150,000
		$346,000

and that there are no unsatisfied judgments or executions standing against me, and that the amount of my debts and liabilities of every kind, absolute and conditional, does not

exceed mortgages as above of $162,000, and that I am under no bond other than this on said property; that my credit is good, and that I am worth in good property not less than $600,000 over and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property.

Louis F. Buff.

[fol. 9] Boston, Mass., December 2, 1930.

Subscribed and sworn to before me. Edith G. Rollins, Deputy Clerk United States District Court, Mass. Dist.

IN UNITED STATES DISTRICT COURT

PETITION BY LOUIS RAPHAEL, A CREDITOR OF SAID MONROE STORES, INC., FOR LEAVE TO INSTITUTE PROCEEDINGS UPON BOND—Filed and Allowed March 23, 1931

To the Honorable the Judges of the United States District Court for the District of Massachusetts:

The petition of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, respectfully shows:

1. That shortly prior to November 26, 1930, one Harold F. Dempsey of Boston, in the County of Suffolk, in said District, made an offer in writing to purchase from George B. Monroe, the receiver of the assets of Monroe Stores, Inc., theretofore appointed by this court in these proceedings, all the assets of said corporation of every name, nature, character and kind and wheresoever situated, a copy of which offer is hereto annexed marked "A"; that said original offer is filed in this court and is part of the record of the proceedings in said cause; that by the terms of said offer said Harold F. Dempsey offered, among other things, to pay to the creditors of said Monroe Stores, Inc., a sum equal to 30 per cent of their respective claims in or within thirty (30) days after their claims had been duly approved and allowed; that by said offer said Harold F. Dempsey offered to file in court a bond in the penal sum of one hundred thousand dollars ($100,000), with good and sufficient sureties, the conditions of said bond being that if the said

Dempsey shall perform the obligations of said offer, that said bond shall be null and void, and that otherwise it shall be in full force and effect and the sureties liable thereon.

[fol. 10] 2. That on or about November 26, 1930, said written offer of said Harold F. Dempsey was duly accepted by said receiver of said Monroe Stores, Inc., in pursuance to an order of this court, and that thereafter said Harold F. Dempsey filed in this court a bond in the penal sum of one hundred thousand dollars ($100,000), a copy of which is hereto annexed marked "B"; that by the terms of said bond said Harold F. Dempsey, as principal, and one Louis F. Buff of said Boston and one Clifford S. Drake of Northampton, in the State of New Hampshire, as sureties, bound and obliged themselves unto the United States of America in the full and just sum of one hundred thousand dollars, to secure the performance by said Harold F. Dempsey of all the conditions and items of said offer; that said bond and said sureties thereon were duly approved by the court on December 2, 1930.

3. That prior to said written offer the court had issued an order requiring persons holding claims against said Monroe Stores, Inc., to present their proofs of claim therefor to said receiver for allowance on or before September 30, 1930; that the time fixed in said order was later extended by the court to November 15, 1930.

4. That on or about September 25, 1930, your petitioner duly presented to said receiver his proof of claim; that thereafter, to wit, on or about February 9, 1931, said proof of claim was duly approved and allowed in the sum of thirty-five thousand dollars ($35,000); that said Harold F. Dempsey, the purchaser of said assets and the principal on the bond above referred to, and said Louis F. Buff and Clifford S. Drake, the sureties on said bond, duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel; that by the terms of said written offer, and under the provisions of said bond filed in connection therewith, your petitioner became entitled to receive from said Harold F. Dempsey in thirty days thereafter 30 per cent of the amount in which said proof of claim was allowed, to wit, 30 per cent of $35,000, i. e., ten thousand

five hundred dollars($10,500); that on or about March 12, 1931, your petitioner duly demanded payment of said sum of $10,500; that your petitioner made said demand upon the [fol. 11] said Harold F. Dempsey, and also communicated with said receiver; that said sum has not been paid to your petitioner, and that your petitioner thereafter made further demands upon said sureties on said bond.

5. That your petitioner has received through counsel for said Harold F. Dempsey on account of the amount due him as aforesaid, under the provisions of said offer to purchase said assets and under the provisions of said bond, the sum of only twelve hundred dollars ($1,200); that your petitioner is entitled to receive the balance of nine thousand three hundred dollars ($9,300) with interest thereon from March 11, 1931, when demand for payment was duly made by him as aforesaid.

6. That upon acceptance of said offer and upon the filing and approval of said bond, the receiver of said Monroe Stores, Inc. did, in consideration thereof, convey and deliver to said purchaser, Harold F. Dempsey, all the assets of said Monroe Stores, Inc., which assets were of great value; that in justice and in equity, the said principal and sureties on said bond should be forthwith compelled to pay to your petitioner the balance of said 30 per cent of the amount in which your petitioner's said claim was approved and allowed.

Wherefore your petitioner prays that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond, and for such other and further orders and decrees as to this Honorable Court may seem meet and proper.

Dated this twenty-third day of March, 1931.

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Mark M. Horblit. Jurat omitted in printing.

[fol. 12] March 23, 1931.

LOWELL, J.:

Petition allowed; leave to sue granted to petitioner, Louis Raphael.

Attest:

John E. Gilman, Deputy Clerk.

A

UNITED STATES OF AMERICA:

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

J. B. HIRSHFIELD CO., INC.,

v.

MONROE STORES, INC.

OFFER

Herewith is enclosed certified checks for $10,000 accompanying my bid.

Pursuant to the order of the District Court of the United States for the District of Massachusetts entered on the 12th day of November, 1930, in the matter of Hirshfield v. Monroe Stores, #3293, Equity, I, the undersigned, offer to purchase all of the assets of every name, nature, character and kind and wheresoever situated and without limiting the generality of the foregoing, said offer shall include all merchandise, fixtures, stock in trade, cash in bank, good-will, leaseholds, etc., of George B. Monroe, Receiver of The Monroe Stores, Inc. on the following terms and conditions:

1. I will pay thirty per cent of the claims of all the creditors of The Monroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed, it being understood that said creditors shall include only those creditors who have filed their proof of claim with the Receiver pursuant to the order of this Court on or before the 15th day of November, 1930. It is further

understood that I shall have the right to contest any and all claims in which the Receiver sets forth a good objection to the allowance of said claims.

[fol. 13] 2. I will pay any and all liabilities of the Receiver within thirty days after said claims against the Receiver have been duly allowed by this Court. It is understood that in no event shall the claims against the Receiver exceed $20,000.00, which shall include claims against the Receiver for the purchase of merchandise, administration expenses, counsel fees, etc.

3. I will, within ten days after the sale of the assets has been duly confirmed by this court, transfer all of said assets or their equivalent to a corporation already organized or to be organized with the following capital structure:

25,000 shares of preferred stock—$10 par value.
100,000 " " Class A " —no " "
1,000 " " " B " — " " "

3-A. The preferred stock shall pay cumulative dividends at the rate of 7% per annum, quarterly annually. The holders of the preferred stock shall have no voting rights except in the event that four successive dividends on said preferred stock remain unpaid at which time it will have the exclusive voting rights until said accrued dividends are paid or a sufficient amount set aside thereof for its payment.

The preferred stock may be called on 30 days' notice in whole or in part at the rate of $11 per share plus accrued dividends due and unpaid thereon.

In the event of dissolution and liquidation, whether voluntary or unvoluntary, the net proceeds of the entire assets of the company shall be first applied to the payment to the holders of the preferred stock of the sum of $10 per share and accrued and unpaid dividends thereof, and the balance of the net proceeds, if any, shall be divided among the holders of the Class A and Class B stocks, 50% to go to Class A and 50% to go to Class B stock.

3-B. After dividends have been paid or set aside on preferred stock the Class B stock shall be entitled to dividends at the rate of $12 per share per annum which shall be non-cumulative. Each share of Class B stock issued

[fol. 14] and outstanding shall be entitled to 100 votes at any stockholders' meeting of the aforesaid corporation so long as preferred stock is not entitled to vote as aforesaid.

3-C. After dividends have been paid or set aside on the preferred stock and the Class B stock as aforesaid, the Class A stock shall be entitled to dividends at the rate of 60c. per share per annum which shall be non-cumulative.

4. In any one year in which dividends are declared or set aside on Class A stock up to and including 60c. per share and on Class B stock up to and including $12.00 per share, any and all dividends declared during said year shall be declared 50% to the Class A stock and 50% to the Class B stock issued and outstanding. Each share of Class A stock issued and outstanding shall have one vote at any stockholders' meeting of the aforesaid corporation so long as the preferred stock is not entitled to voting rights as aforesaid.

5-A. The stockholders of The Monroe Stores, Inc. may acquire preferred stock of the aforesaid corporation at the rate of 20% of their present preferred stock holdings in The Monroe Stores, Inc. upon payment of $10.00 per share for said preferred stock of said aforesaid corporation and receive five shares of Class A stock of the aforesaid corporation for each share of the preferred stock of the aforesaid corporation acquired by them, providing they acquire and pay for preferred stock of the aforesaid corporation on or before the 15th day of January 1931.

6. It is understood that I am to receive 1,000 shares of Class B stock of the aforesaid corporation and to receive any and all money advanced and paid by me or for my account plus a bonus of $25,000.00.

7. I will, within seven days from the acceptance of this offer, present to the court a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void, otherwise it shall be in full force and effect and the sureties liable thereon.

8. Upon acceptance of this offer by the court and upon approval of said bond, said sale shall be confirmed by the

[fol. 15] court and the assets of George B. Monroe, receiver of The Monroe Stores, Inc. shall forthwith be transferred, set over and assigned to me, free and clear of any and all liens and/or encumbrances.

9. In the event my offer is not accepted on the 25th day of November, 1930, my offer is hereby revoked and the $10,000 in certified checks are to be returned to me. Time is of the essence of the offer.

Harold A. Dempsey. Ralph H. Robb, Counsel.

B

Bond

Know all men by these presents that I, Harold A. Dempsey of Boston in the County of Suffolk and Commonwealth of Massachusetts, as Principal, and Louis F. Buff of Boston, Suffolk County, Mass., and Clifford S. Drake of North Hampton in the State of New Hampshire as sureties are firmly bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally, firmly by these presents.

The conditions of this obligation are such, that whereas, in Equity Case #3293, now pending in this District Court of the United States, District of Massachusetts, entitled J. B. Hirschfeld & Co., Inc., et als. vs. The Monroe Stores, Inc., Harold A. Dempsey made an offer in writing to purchase all of the assets of every name, nature, character, and kind and wheresoever situated, of George B. Munroe, Receiver of said The Monroe Stores Inc. as more fully set forth in said offer, and

Whereas, in connection with said offer a bond guaranteeing the performance of the conditions and terms of said offer is required.

Now, therefore, if the said Harold A. Dempsey shall com- [fol. 16] ply with all the conditions and items of said offer then this obligation to be void, otherwise to be and remain in full force and effect.

In Witness Whereof we hereunto set our hands and seals this 26th day of November A. D. 1930.

Harold A. Dempsey, Louis F. Buff, Clifford S. Drake.

Witness to all signatures: Ralph H. Robb.

Approved [initials] Dec. 2, 1930.

IN UNITED STATES DISTRICT COURT

ANCILLARY BILL OF COMPLAINT—Filed April 16, 1931

Comes now your petitioner, the United States of America, and alleges as follows:

1. That heretofore and on the, to wit, the twenty-first day of July, 1930, George B. Monroe of Quincy, Massachusetts, was duly appointed receiver of the assets of The Monroe Stores, Inc., and thereafter the said George B. Monroe duly qualified as receiver; that on the, to wit, the twenty-fifth day of November, 1930, by an order of this court, all the assets of The Monroe Stores, Inc., were sold by George B. Monroe, receiver, to one Harold A. Dempsey upon the terms and conditions as set forth in the offer filed by the said Harold A. Dempsey in this court, reference to which is hereby made, which said offer was duly accepted; that on the, to wit, the twenty-sixth day of November, 1930, pursuant to a decree entered on the offer to purchase in this cause, reference to which is hereby made, the said Harold A. Dempsey filed his bond in the penal sum of one hundred thousand (100,000) dollars, payable to the United States of America. The condition of such bond was a faithful performance of all the terms and conditions of the offer of purchase filed in this cause by the said Harold A. Dempsey and on the decree entered thereon.

2. That Louis F. Buff of Boston, Massachusetts, and Clifford S. Drake of Cambridge, Massachusetts, signed and [fol. 17] executed such bond as sureties for the said Harold A. Dempsey; said bond is filed in this cause, reference to same is hereby made.

3. That Harold A. Dempsey is a citizen and resident of the city of Boston, Commonwealth of Massachusetts; that Louis F. Buff is a citizen and resident of the city of Boston, Commonwealth of Massachusetts; that Clifford S. Drake, although he claims a residence in the State of New Hampshire, is actually a resident of the city of Cambridge, Commonwealth of Massachusetts, and lives at No. 79 Upland Road, Cambridge, Massachusetts.

4. That pursuant to the terms of said offer and decree thereon, the said Harold A. Dempsey agreed to pay all the expenses and obligations of the receiver of the Monroe Stores, Inc., and thirty (30) percent of the face amount of the claims of the creditors of the Monroe Stores, Inc., which were approved and allowed by this court. There is due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts due the creditors who have filed their claims, and which claims have been allowed by this court, a total balance of thirty-four thousand eight hundred fifty-six dollars and fourteen cents ($34,856.14); that more than thirty (30) days have elapsed since said claims were approved and allowed by this court, and the payments thereon are past due and now owing. The obligations of the receiver which have not been paid by the said Harold A. Dempsey are past due and now owing; that demand has been made upon the said Harold A. Dempsey for the payment of the balance due on account of the receiver's obligations and expenses, and on account of claims due and allowed by this court, but the said Harold A. Dempsey has failed and refused to pay same and continues to fail and refuse to pay same.

5. That Harold A. Dempsey, the principal and maker of such bond, is the owner of both real and personal property situate and being in the Commonwealth of Massachusetts in the name of Harold A. Dempsey. The said Harold A. Dempsey has deposits in banks duly organized under the laws of the United States of America, which said banks have usual places of business in Boston and/or trust com- [fol. 18] panies duly organized and existing under the laws of the Commonwealth of Massachusetts.

6. That said Louis F. Buff signed and executed the aforesaid bond as surety; that said Louis F. Buff is financially

interested in, either through stock ownership or otherwise, the following corporations: The Babson Dow Machinery Company, the Buff & Buff Manufacturing Company, and the Henrici Laundry Company, all corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts; that said Louis F. Buff is the owner of various parcels of real estate located in the Commonwealth of Massachusetts and the owner of personal property located in the Commonwealth of Massachusetts; that the said Louis F. Buff has deposits with various national banks duly organized and existing under the laws of the United States of America and having usual places of business in the Commonwealth of Massachusetts, and more particularly in the city of Boston, and various trust companies duly organized and existing under the laws of the Commonwealth of Massachusetts and having usual places of business in the city of Boston, which said bank deposits are either in the name of Louis F. Buff and/or L. F. Buff and/or Louis F. Buff with descriptive words such as "trustee", "special account", "R. E. Special Account" and/or "R. E. Trustee Account", and otherwise.

7. That said Clifford S. Drake is actually a citizen and resident of the city of Cambridge, but claims to be a citizen and resident of the State of New Hampshire. The said Clifford S. Drake resides at 79 Upland Road, Cambridge, Massachusetts; that Clifford S. Drake signed and executed the aforesaid bond as surety; that Clifford S. Drake is the owner of various tracts of real estate located in the Commonwealth of Massachusetts, the record legal title to such properties standing in the name of either Clifford S. Drake and/or Ida M. Hodgdon and/or Louise C. Castleman or other parties; that said property is owned by the said Clifford S. Drake but upon information and belief the record title to said properties is in the names of Ida M. Hodgdon and/or Louise C. Castleman and other parties for the purpose of hindering, delaying and defrauding the creditors [fol. 19] of the said Clifford S. Drake and more particularly to hinder and delay the payment of the balance due on account of the purchase price of the assets of The Monroe Stores, Inc., by Harold A. Dempsey.

Upon information and belief the said Clifford S. Drake is the owner of a large amount of real estate situate and

being in the State of New Hampshire, which said property is either in the name of Clifford S. Drake and/or Ida M. Hodgdon and/or Louise C. Castleman; that the said Clifford S. Drake has deposited with the Atlantic National Bank of Boston a large amount of securities and has given to the said Atlantic National Bank of Boston mortgages on various tracts of land to secure loans; that the value of said properties, both real and personal, are in excess of the amount due or to become due on said loan and that there is a large equity in said properties which can be reached and applied to the payment of the balance due on account of the purchase price of the assets of The Monroe Stores, Inc.; that the said Clifford S. Drake is the owner of various deposits in banks having usual places of business in Boston, which said banks are duly organized under the laws of the United States of America and/or trust companies duly organized and existing under the laws of the Commonwealth of Massachusetts, having usual places of business in Boston and/or Waltham and/or Cambridge.

8. That the said Harold A. Dempsey, although he appears as a purchaser of the assets, your petitioner alleges, upon information and belief, that the said Louis F. Buff and Clifford S. Drake are the real parties in interest and the real purchasers of the assets of The Monroe Stores, Inc.

Wherefore your petitioner prays:

1. That this court issue an injunction against the said Harold A. Dempsey, the said Clifford S. Drake, the said Louis F. Buff, the said Ida M. Hodgdon and the said Louise C. Castleman enjoining each and all and every one of said parties from transferring, conveying, assigning or in any manner disposing of any of the properties, real or personal, standing in the name of Harold A. Dempsey and/or [fol. 20] Louis F. Buff and/or Clifford S. Drake and/or Louise C. Castleman and/or Ida M. Hodgdon.

2. That the said Harold A. Dempsey and/or Louis F. Buff and/or Clifford S. Drake be ordered and directed to pay over to the clerk of the United States District Court for the use and benefit of the receiver of The Monroe Stores, Inc., the creditors of the receiver and the creditors of The

Monroe Stores, Inc., the balance due on account of the purchase price of the assets of The Monroe Stores, Inc.

3. That the said Harold A. Dempsey, Louis F. Buff, Clifford S. Drake and/or Ida M. Hodgdon be enjoined from disposing, transferring, conveying, assigning or encumbering any of the properties of any of the aforesaid parties or of any moneys, credits or deposits of any of the aforesaid parties deposited in any bank or banks, trust companies or trust companies or in the possession of any of said parties during the pendency of this action.

4. That the said Louis F. Buff and the said Harold A. Dempsey and the said Clifford S. Drake be ordered and directed to appear before this Honorable Court and to disclose the properties and assets owned by them, and for such other and further relief as may be meet and just.

5. That a writ of attachment be issued attaching the interest of the said Clifford S. Drake in the equity of the securities and other assets pledged with the Atlantic National Bank of Boston by the said Clifford S. Drake as security for the loan or loans made by the Atlantic National Bank of Boston to Clifford S. Drake.

The United States of America, by Andrew J. Aldridge, Attorney.

Duly sworn to by Andrew J. Aldridge. Jurat omitted in printing.

[fol. 21] Let an order of notice issue returnable April 27th.

J. A. L., D. J.

April 16, 1931.

IN UNITED STATES DISTRICT COURT

INTERLOCUTORY DECREE FOR INJUNCTION, ETC.—May 4, 1931

LOWELL, J.:

This cause came on to be heard at this sitting and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that Harold A. Dempsey of Boston, Commonwealth of Massachusetts,

Louis F. Buff of Boston, Commonwealth of Massachusetts, and Clifford S. Drake of Cambridge, Commonwealth of Massachusetts, defendants, be and they are hereby enjoined and restrained from transferring, conveying, assigning, encumbering, hypothecating, or in any other manner disposing of any property real, personal or mixed of whatever nature or kind, owned by them or any of them, individually or otherwise, whether standing in their name or names of any other person until further order of this court.

It is further ordered, adjudged and decreed that the said Harold A. Dempsey, Louis F. Buff and Clifford S. Drake be and they are hereby enjoined and restrained from disposing of by checks, drafts, acceptances, orders, or otherwise, any of the moneys, funds, credits, deposits, commercial or otherwise, belonging to them or any of them standing in the name of or deposited to their credit or standing in the name of or deposited to the credit of any other person or persons in any bank or banks, trust company or trust companies or in the possession of any of them until further order of this court.

It is further ordered, adjudged and decreed that the said [fol. 22] Harold A. Dempsey, Louis F. Buff and Clifford S. Drake and each of them be and they are hereby enjoined and restrained from drawing and/or executing any checks, drafts or other instruments of whatever nature or kind, transferring any moneys, funds or credits standing in their name or in the name of any of them or standing in the name of any other person or persons or any bank or banks, trust company or trust companies until the further order of this court.

It is further ordered, adjudged and decreed that the said Clifford S. Drake be and he hereby is enjoined and restrained from transferring, conveying, assigning, encumbering, hypothecating, or in any other manner disposing of any property real or personal standing in his name or in the name of Louise C. Castleman and/or Ida M. Hodgdon until the further order of this court.

It is further ordered, adjudged and decreed that the said Clifford S. Drake be and he hereby is enjoined and restrained from transferring, assigning, conveying, encumbering, hypothecating, or in any other manner disposing of the equity in the securities or other assets pledged by him

to the Atlantic National Bank of Boston, as security for a loan, until the further order of this court.

It is further ordered, adjudged and decreed that the pleadings be completed by not later than Friday, May 8, 1931.

It is further ordered, adjudged and decreed that this cause be referred to Marcus Morton, Jr. of Cambridge, Commonwealth of Massachusetts, as special master to hear the parties and their evidence and to find the facts and report the same together with his conclusions thereon to this court in accordance with the equity rules together with such parts of the evidence as any party may, in writing, request.

It is further ordered, adjudged and decreed that the special master proceed as expeditiously as practicable; that he may sit anywhere within the District as he may determine or elsewhere by consent of the parties; that his compensation shall be at the rate of twenty-five (25) dollars per day to be taxed in the cost of the party prevailing.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

[fol. 23] May 4, 1931.

J. A. L., D. J.

IN UNITED STATES DISTRICT COURT

FINAL DECREE ON ANCILLARY BILL OF THE UNITED STATES AGAINST CLIFFORD S. DRAKE ET AL.—July 16, 1931

LOWELL, J.:

This cause came on to be heard at this sitting and was argued by counsel and, all parties consenting hereto, upon consideration thereof, it is ordered adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants Clifford S. Drake, Louis F. Buff and Harold A. Dempsey, jointly and severally, and that execution issue forthwith.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

July 16, 1931.

J. A. L., D. J.

In United States District Court

Receiver's Petition for Contempt as to Defendants Louis F. Buff and Clifford S. Drake—Filed October 7, 1931

Now comes George B. Monroe, as he is receiver of The Monroe Store, Inc. and alleges:

1. That he was duly appointed receiver of the assets of The Monroe Stores, Inc. by a decree of this court, reference to which is hereby made and made a part hereof.

2. On about the, to wit, the twenty-fifth day of Novem- [fol. 24] ber, 1930, pursuant to an order of this court, the assets of The Monroe Stores, Inc. were sold to one Harold A. Dempsey of Boston.

3. That the offer to purchase said assets was filed in this court and was accepted by an order of this court; that said offer, in substance, provided that Harold A. Dempsey would pay to the creditors of The Monroe Stores, Inc. thirty percent (30%) of the claims approved and allowed by this court against The Monroe Stores, Inc. in or within thirty (30) days of the approval and allowance of the claims by this court, and also would pay all debts and obligations of the receiver. Reference is hereby made to the offer and the decree thereon and both are made a part hereof.

4. That Harold A. Dempsey was required to file a bond with the clerk of the United States District Court for the District of Massachusetts, payable to the United States of America, conditioned for the faithful performance of the obligations undertaken by him, and Louis F. Buff and Clifford S. Drake signed and executed said bond as sureties.

5. That, upon information and belief, Harold A. Dempsey was not the real purchaser of the assets of The Monroe Stores, Inc. but your petitioner is informed and believes and therefore alleges that Louis F. Buff and Clifford S. Drake were the real parties in interest and were the real purchasers of said assets.

6. That at the time Louis F. Buff and Clifford S. Drake qualified as sureties on the bond of Harold A. Dempsey, Louis F. Buff made oath before a deputy clerk of the

United States District Court for the District of Massachusetts that he was worth approximately six hundred thousand dollars ($600,000) and filed a statement with the clerk of the United States District Court showing net assets of three hundred and forty-six thousand dollars ($346,000); that Clifford S. Drake made oath before a deputy clerk of the United States District Court for the District of Massachusetts that he was worth net one hundred fifty-eight thousand two hundred fifty-five dollars ($158,255).

7. That heretofore and on the, to wit, the fourth day of May, 1931, a decree was entered in this cause enjoining Harold A. Dempsey, Louis F. Buff and Clifford S. Drake [fol. 25] from transferring, assigning and/or in any manner disposing of any of their properties. Your petitioner is informed and believes and upon such information and belief alleges that Clifford S. Drake, in violation of the injunction entered in this cause, has transferred, assigned or disposed of property belonging to him.

8. Your petitioner is informed and believes, and upon such information and belief alleges, that the schedule of assets filed by the said Clifford S. Drake with the deputy clerk of the United States District Court was false in this, that the said Clifford S. Drake did not own seventy-five thousand dollars ($75,000) worth of tax titles as set forth in said schedule.

9. That Harold A. Dempsey, Louis F. Buff and Clifford S. Drake failed to carry out the agreement made by them with this court, namely, to pay to the creditors of The Monroe Stores, Inc. thirty per cent (30%) of the amount of their claims which were approved by this court for payment and failed to pay all the obligations of the receiver, and on the, to wit, the sixteenth day of April, 1931, suit by an ancillary bill of complaint was filed in this court in this cause against said parties and on the, to wit, the sixteenth day of July, 1931, judgment in the sum of 32,026.83/100 dollars was entered against each of said parties.

10. That thereafter execution was issued on said judgment which was placed in the hands of the United States marshal for this District and thereafter the United States marshal made demand for the payment of the execution, but said Harold A. Dempsey, Louis F. Buff and Clifford S.

Drake have failed and refused to pay said judgment and said execution remains unpaid and unsatisfied.

11. That on the, to wit, the twenty-first day of September, 1931, counsel representing the receiver and counsel representing the said Louis F. Buff and Clifford S. Drake appeared before this court, in chambers, and counsel on behalf of the said Louis F. Buff and Clifford S. Drake agreed with this court that said Louis F. Buff and said Clifford S. Drake would, if given an opportunity, pay and satisfy said judgment and your petitioner alleges that since [fol. 26] said date no funds have been paid to your petitioner on account of said judgment.

12. Your petitioner is informed and believes and upon such information and belief alleges that from and after the first day of March, 1931, the said Louis F. Buff and Clifford S. Drake have endeavored to evade the obligation and duties entered into by them with this court and have knowingly and purposely attempted to frustrate and evade the orders and decrees of this court and have knowingly entered into undertakings with this court with no intention or purpose of carrying same out.

13. Your petitioner is informed and believes and upon such information and belief alleges that said Louis F. Buff and Clifford S. Drake have been and now are attempting to avoid the payment of their obligations to the creditors of The Monroe Stores, Inc.

14. Your petitioner is informed and believes and upon such information and belief alleges that said Louis F. Buff and Clifford S. Drake have attempted to purchase claims of the creditors of The Monroe Stores, Inc. for sums less than the amount agreed upon by them with this court in violation of their obligations in an agreement with this court to pay said creditors thirty cents ($.30) on the dollar and have, through their agents and/or representatives, caused to be written letters to the creditors of The Monroe Stores, Inc. containing false and fraudulent statements to the effect that the principal and sureties on the bond filed in this court were not financially responsible. Copies of such letters are hereto attached and made a part hereof.

15. That your petitioner is informed and believes and upon such information and belief alleges that said Louis F.

Buff and Clifford S. Drake are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment in this cause but have failed and refused to pay or satisfy said judgment.

16. That from and after the first day of March, 1931, the said Louis F. Buff and Clifford S. Drake have attempted to [fol. 27] hinder and delay your petitioner in the administration of his duties as receiver of the assets of The Monroe Stores, Inc. by failing and refusing to pay to your receiver the sums due on account of the claims filed by the creditors of The Monroe Stores, Inc. with your receiver.

Wherefore your petitioner prays:

1. That an order or decree of this court may be issued citing the said Louis F. Buff and the said Clifford S. Drake to show cause why they should not be adjudged in contempt.

2. And for such other and further relief as may seem meet and just.

Respectfully submitted.

George B. Monroe, Receiver, by A. J. Aldridge, Attorney.

[On letterhead of the Credit Clearing House Adjustment Corporation, 665 Atlantic Avenue, Boston, Mass.]

August 3, 1931.

Re Monroe Stores

We recently wrote you relative to our being able to get settlement of your claim on the basis of 15% and although the majority of creditors have accepted, a number of them have made no comments whatever, which includes your claim.

From what we are able to gather, the funds available for this settlement are limited, and the party advancing the money now informs us that he will not entertain settlements of any kind unless such creditor's intent to accept, is with him not later than August 10th.

From our viewpoint of the matter, it is a case where those creditors who accept 15% in settlement of their claim will receive their money and the probabilities are that creditors who do not accept, will receive nothing on their claims, and by reason of the ultimatum given us on acceptances or intent of acceptances being limited until August 10th, we are giving you the opportunity of signifying your intent of accepting such within that time.

If it is your desire to assent, it will be to your interest to inform us at once.

Yours very truly, The Credit Clearing House Adjustment Corporation.

[fol. 28] [On back:] Received Aug. 44, 1931. Laing Brothers Co., per C. E. B. CHJ.

[On letterhead of the Credit Clearing House Adjustment Corporation, 665 Atlantic Avenue, Boston, Mass.]

To the creditors of Monroe Stores, Inc., Boston and vicinity:

You no doubt are familiar with this Receivership, in that an offer was made for the assets—for a sum equivalent to 30% of creditors' claims, in which the Clerk directed the Receiver to transfer the assets; which accordingly was done at the time.

For the full and faithful performance of the obligation a bond signed by the Principal, and two individuals, as sureties, was given, rather than a surety bond—which, in most instances is demanded. The result (you undoubtedly are likewise aware of) is that no payments have been made by the purchaser or sureties—none of them financially responsible; by reason of which creditors' remedy would be filing a suit against the Principal and sureties in the United States District Court; and although such action has been started by various creditors, one of them we understand has obtained a judgment—but cannot collect thereupon.

There is a possibility, of course, through the non-payment of such judgment, that the Principal might be brought in upon suit charges; but from our investigation of the matter, in all probabilities would likewise result in little monetary benefit to such creditors.

Your claim is comparatively small, and it would not seem to us that it would warrant such expense, as it would necessitate each creditor bringing an individual action as a beneficiary under the bond; and, as we are representing a good number of creditors started with such action, whereupon we have received an offer of compromise in the amount of 15%—that is 15% of the original claim, we believe that we can recover this amount for you if you are willing to accept it. If so, kindly inform us, when we will send on to you at once an assignment of the claim to be surrendered upon the payment of said 15%.

Very truly yours, The Credit Clearing House Adjustment Corporation.

CHK. RC.

[fol. 29] [On back:] Received Jul. 22, 1931. Laing Brothers Co., per C. E. B. C. H. J.

IN UNITED STATES DISTRICT COURT

ORDER ON PETITION FOR CONTEMPT—October 21, 1931

LOWELL, J.:

This cause came on to be heard at this sitting, was argued by counsel and all parties consenting hereto, upon consideration thereof, it is ordered that defendants Louis F. Buff, Clifford S. Drake and Harold A. Dempsey transfer and assign to George B. Monroe, receiver of The Monroe Stores, Inc., their claim or claims against the W. E. Noyes Company and/or the estate of W. E. Noyes Company and/or the trustee in bankruptcy of the W. E. Noyes Company, which said bankruptcy cause is now pending in the United States District Court for the District of Massachusetts before the Honorable Charles C. Cabot, referee, being No. 49001.

It is further ordered that the defendants Louis F. Buff and Clifford S. Drake pay to George B. Monroe, receiver of The Monroe Stores, Inc., the sum of one thousand dollars ($1,000) on the twentieth day of October, 1931, and a like sum on the twentieth day of each month thereafter until the execution issued on the judgment in the matter of J. B. Hirshfeld & Co., Inc., et als. v. Clifford S. Drake et al.

(Ancillary Bill of Complaint, Equity No. 3293), is satisfied.

It is further ordered that the final disposition of this matter be held pending the further orders of this court.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

October 21, 1931.

J. A. L., D. J.

[fol. 30] In United States District Court

Motion of George B. Monroe to Amend Order Allowing Louis Raphael to Bring Suit in the Superior Court for the County of Suffolk Against Louis F. Buff, Clifford S. Drake, and Harold A. Dempsey—Filed November 27, 1931

Comes now your petitioner George B. Monroe, as he is receiver of The Monroe Stores, Inc., and moves the court to modify the order heretofore entered on the, to wit, the twenty-third day of March, 1931, by this court in which said order one Louis Raphael was permitted to sue, in the name of the United States of America for his own benefit, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake on a bond given in this court in the above-entitled cause by said parties in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, and for grounds thereof your petitioner sets down and assigns the following:

1. That at the time the said order was issued no suit was pending against the said defendants, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake, in this court on said bond, but thereafter on or about the sixteenth day of April, 1931, your petitioner filed an ancillary bill of complaint against the said defendants on said bond and thereafter on the, to wit, the sixteenth day of July, 1931, judgment in the sum of thirty-three thousand twenty-six dollars and eighty-nine cents ($33,026.89) was entered against the said defendants, which judgment included the sum of nine thousand three hundred dollars ($9,300) due Louis Raphael.

2. That on the, to wit, the nineteenth day of October, 1931, upon a petition filed in this court by your petitioner citing the said defendants for contempt for failure to pay the judgment for $33,026.89 this court entered an order

directing the defendants to pay to your petitioner the sum of one thousand dollars ($1,000) per month until the full amount of the execution on said judgment is paid, which order the defendants have and are now complying with. The said Louis Raphael has prosecuted his suit in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, and has made a motion for a final decree in [fol. 31] said cause, a copy of which is hereto attached and made a part hereof; that if the said Louis Raphael is permitted to proceed further in said cause in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, the proper and orderly administration of the receivership in this court will be seriously interfered with; that this court had original jurisdiction in this matter and now has jurisdiction in this cause.

Wherefore, your petitioner prays that the order heretofore entered on the twenty-third day of March, 1931, permitting the said Louis Raphael to sue on said bond be modified and that the said Louis Raphael be enjoined from further prosecuting his cause of action; that the said Louis Raphael, his attorneys, servants and agents be enjoined from further prosecuting his cause of action in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, except insofar as to reduce his claim to judgment, and for such other and further relief as to this court may seem meet and just.

Respectfully submitted.

George B. Monroe, Receiver, by A. J. Aldridge, Attorney.

[Copy]

Commonwealth of Massachusetts,
Suffolk, ss:

Superior Court

In Equity. 37782

United States of America ex Rel. Louis Raphael
vs.
Harold A. Dempsey et al.

Final Decree

This cause came on to be heard at this sitting upon the plaintiff's motion for the entry of a final decree and was

argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That the defendants, Harold A. Dempsey, the principal on the bond referred to in the bill of complaint and Clifford S. Drake and Louis F. Buff, the sureties on said bond, are jointly and severally indebted to Louis Raphael, the relator [fol. 32] named in the bill of complaint in the sum of $9300.00, together with interest thereon from March 12, 1931 to the date of the entry of this decree amounting to $390.60, making a total indebtedness of $9690.60.

2. That said defendants, Dempsey, Drake and Buff pay to said relator within thirty days hereafter the amount of their said joint and several indebtedness to said relator, namely $9690.60 together with costs taxed as at law in the sum of $— making a total of $—.

3. That said relator has a right to reach in these proceedings the stock certificates, mortgages, real estate and bank deposits found in the master's report to be owned by each of the respective defendants and to have the same sold and applied toward the satisfaction of said indebtedness, in the event that said defendants shall fail to satisfy said indebtedness within the time provided in paragraph 2 hereof.

4. That —— ——, Esq., be, and he hereby is, appointed special master; that in the event of failure on the part of said defendants, Dempsey, Drake and Buff to satisfy said indebedness and costs within the time provided by paragraph 2 hereof, said special master is hereby authorized and ordered forthwith thereafter to take possession of and to sell at public auction all right, title and interest of said several defendants in and to the following property found in the master's report to be owned by said respective defendants, to wit:

a. The certificates owned by the defendant, Drake representing 100 shares of preferred stock of Mullins Mfg. Co. referred to in paragraph 25 of the master's report.

b. The several parcels of land owned by the defendant, Drake referred to in Exhibit F annexed to the master's report.

c. The mortgages held by said defendant, Drake and referred to in paragraph 28 of the master's report and amounting approximately to $150,000.00.

d. Certificates owned by said defendant, Buff representing 125 shares of W. E. Noyes Co., referred to in paragraph 19 of the master's report.

e. The certificates owned by said defendant, Buff representing shares of capital stock of the defendant, Henrici [fol. 33] Laundry Machinery Co. aggregating in par value the sum of $150,000.00 referred to in paragraph numbered 21 of the master's report.

f. The certificates owned by said defendant, Buff represting 140 shares of first preferred stock, 40 shares of the second preferred stock and 523 shares of the common stock of Babson Dow Mfg. Co. referred to in paragraph 22 of the master's report.

g. The certificates owned by said defendant, Buff representing shares of capital stock of Buff & Buff Mfg. Co., referred to in paragraph 23 of the master's report.

5. In the event that said amount of $— or any part thereof shall remain unpaid after the lapse of thirty days from the date hereof, said defendant Drake is hereby ordered to deliver to said special master forthwith, upon demand thereafter made by him, the following:

a. Said certificates for 100 shares of preferred stock of Mullins Mfg. Co. endorsed in blank.

b. All the unrecorded deeds from the respective nominees of said Drake conveying to him the respective parcels referred to in said Exhibit F annexed to the master's report.

c. All the mortgage notes and mortgage deeds referred to in paragraph 28 of the master's report.

d. Assignments of each of said mortgages, in common form, duly signed, sealed and acknowledged by said Drake transferring and assigning said mortgages, and the notes and debts secured thereby to such person or persons as said special master shall in writing direct.

e. A deed or deeds duly signed, sealed and acknowledged by said defendant, Drake conveying to such person or per-

sons as said special master shall in writing direct the several parcels of real estate referred to in Exhibit F annexed to the plaintiff's declaration.

6. In the event that said amount of $— or any part thereof shall remain unpaid after the lapse of thirty days from the date hereof, said defendant Buff is hereby ordered to deliver to said special master forthwith upon demand thereafter made by him, the following:

[fol. 34] a. Said certificates for 125 shares of stock of W. E. Noyes Co. endorsed in blank.

b. Said certificates representing shares of capital stock of Henrici Laundry Machinery Company endorsed in blank.

c. Said certificates representing 140 shares first preferred, 40 shares second preferred and 523 shares common stock of Babson Dow Mfg. Co.

d. Certificates representing all the shares of capital stock owned by said defendant, Buff in Buff & Buff Mfg. Co.

7. Said special master is hereby ordered to apply the proceeds of such sales, after deducting the expenses of the sales and reasonable compensation for his services, toward the full satisfaction of said execution or of any amount then remaining due thereon, the balance, if any, thereafter remaining of the proceeds of said sales shall be paid out by the special master to said defendants in proportion to the amount received from the sales by the special master of the property owned by said respective defendants.

8. In the event that the net amount received by the special master from the sale of said property mentioned above is insufficient to satisfy the damages and costs established herein, after the payment of said expenses of sale and said compensation to the special master, then execution shall issue in favor of the plaintiff for the balance of said damages and costs.

By the Court.

IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER OF NOTICE—November 30, 1931

LOWELL, J.:

Upon the filing of a motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey this day, and it appearing that there is danger of irreparable injury to the defendant from delay, it is

Ordered that said Louis Raphael be restrained from further prosecuting his cause of action brought pursuant to [fol. 35] an order of said District Court of March 23, 1931, which permitted said Louis Raphael to sue, in the name of the United States of America, for the benefit of himself, Louis F. Buff, Harold A. Dempsey and Clifford S. Drake on a bond given in said District Court in the above-entitled case by said parties in the Superior Court in and for the County of Suffolk, Commonwealth of Massachusetts, pending a hearing upon the prayer of George B. Monroe, receiver of The Monroe Stores, Inc., for a preliminary injunction and until further order of the court, and it is further

Ordered that said Louis Raphael show cause on Thursday, December 3, 1931, at 10 o'clock in the morning, why the prayer of said motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey should not be granted and a preliminary injunction should not issue; and it is further ordered that notice be given to said Louis Raphael by said receiver by serving him with a copy of this order forthwith.

By the Court.

John E. Gilman, Jr., Deputy Clerk.

November 30, 1931.

J. A. L., D. J.

UNITED STATES OF AMERICA,
Massachusetts District:

Boston, Mass., December 1, 1931.

I hereby certify that I have this day served the within restraining order and order of notice upon Mark Horblit by

giving to him in hand at Boston, in said District, a true and attested copy of the within order.

William J. Keville, United States Marshal, by J. A. Gately, Deputy.

Service, $2; travel, .06—$2.06.

[fol. 36] In United States District Court

Plea of Louis Raphael—Filed December 3, 1931

Now comes Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut and, appearing specially upon the order directed to him to show cause why the prayer of the motion filed in said cause on November 30, 1931, by George B. Monroe, as receiver of Monroe Stores, Inc. should not be allowed, says as follows:

1. That on November 26, 1930, a decree was entered in these proceedings ordering said receiver to convey all the assets of said Monroe Stores, Inc. to one Harold A. Dempsey, upon the filing of a bond by said Dempsey in the penal sum of one hundred thousand dollars ($100,000) conditioned to pay each creditor of said Monroe Stores, Inc., in or within 30 days after the allowance of his claim, a sum equal to 30 percent of the amount of his claim as so allowed; that on or about December 2, 1930, said Dempsey did file in this court a bond in the penal sum of one hundred thousand dollars ($100,000), upon which bond, one Louis F. Buff and one Clifford S. Drake are sureties, and that said receiver did thereupon convey to said Dempsey all the assets of said Monroe Stores, Inc.

2. That on September 25, 1930, said Louis Raphael duly filed his proof of claim in said receivership proceedings and that on February 9, 1931, his said claim was duly allowed in the sum of thirty-five thousand dollars ($35,000), said Harold A. Dempsey, Louis F. Buff and Clifford S. Drake, by their counsel, assenting to the allowance of said claim in said amount; that said Raphael thereupon became entitled to receive from said Dempsey, within 30 days after the allowance of his said claim, the sum of ten thousand five hundred dollars ($10,500), being 30 percent of the amount in

which said claim was allowed; that on March 12, 1931, said 30 day period having expired, said Raphael duly demanded payment of the amount due him on said claim; that said Drake and Buff paid to said Raphael on account thereof [fol. 37] the sum of twelve hundred dollars ($1,200), leaving a balance of ninety-three hundred dollars ($9,300) due him on his said claim.

3. That on March 23, 1931, said Raphael, after conferring with said receiver and with his knowledge, filed in this court a petition for leave to sue the principal and sureties on said bond; that on said date this court duly entered an order granting to said Raphael leave to sue as prayed for in said petition.

4. That in pursuance to said order entered by this court, said Raphael did, on April 9, 1931, file in the Superior Court of the Commonwealth of Massachusetts for the County of Suffolk proceedings against the principal and sureties on said bond, said proceedings being entitled "United States of America, ex rel. Louis Raphael v. Harold A. Dempsey et al." and being numbered 37782 Equity on the docket of said Superior Court; that said receiver was not named as a party in said Superior Court proceedings and has never appeared therein or become a party thereto; that on May 25, 1931, said Dempsey, Drake and Buff filed a motion to dismiss said Superior Court proceedings, alleging as a ground therefor the pendency in this court of an ancillary bill of complaint filed against them in this court in the case of J. B. Hirshfeld & Co. Inc. v. Monroe Stores, Inc., No. 3293 Equity, which ancillary bill of complaint was filed on April 16, 1931, subsequently to the commencement of said Superior Court proceedings; that thereafter, to wit, on June 15, 1931, said Dempsey, Drake and Buff filed in said Superior Court proceedings a stipulation in writing whereby they waived their said motion to dismiss, a copy of which stipulation is hereto annexed marked "A."

5. That thereafter, to wit, on June 26, 1931, said Dempsey, Drake and Buff filed an answer to the merits in said Superior Court proceedings and that thereupon said cause was referred by said Superior Court to a master under a rule dated July 1, 1931, directing him to hear the parties and their evidence and to report the facts to said court;

that hearings on the merits of said Superior Court proceedings commenced before the master on or about July 7, 1931, and continued to about July 22, 1931; that said receiver attended as a witness for said Raphael the hearing [fol. 38] before the master held on July 7, 1931, and that Andrew J. Aldridge, Esquire, the attorney for said receiver, at the request of said Raphael attended before the master at a later date and testified as a witness for said Raphael in said proceedings.

6. That after the master had duly prepared his draft report and after a hearing thereon in accordance with the rule of said Superior Court, the master duly filed his report in said Superior Court on October 5, 1931, a copy of which report is hereto annexed marked "B"; that no objections or exceptions to said report were filed by any of the parties in said proceedings; that on or about said date, said Dempsey, Drake and Buff filed in said Superior Court proceedings a motion to recommit said master's report, a copy of which is hereto annexed marked "C," and a motion to amend their answer in said proceedings, a copy of which is hereto annexed marked "D"; that said motion to recommit and said motion to amend said answer were duly heard by said Superior Court; that on October 20, 1931, said Superior Court duly entered orders denying each of said motions, and also, on said date, duly entered an order upon the motion of said Raphael confirming said master's report; that no appeals have been taken from any of said orders entered on October 20, 1931, and that the time for appeal has now elapsed; that said cause is therefore ripe for the entry of a final decree in accordance with the findings of the master in said report as confirmed.

7. That on November 13, 1931, said Raphael duly filed in said Superior Court proceedings a motion for the entry of a final decree, and submitted for the consideration of said court a final decree calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of said Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him; that said motion for the entry of a final decree has been marked for hearing in said Superior Court on December 7, 1931.

8. That the master has found in his report that said Drake and Buff are possessed of shares of stock, real estate, mortgages and bank deposits as follows:
[fol. 39] That said Buff is the president and treasurer of the Henrici Laundry Machinery Company, and holds certificates of capital stock therein amounting in par value to one hundred and fifty thousand dollars ($150,000) (Master's Report, par. 21); that he is also president and treasurer of Babson-Dow Manufacturing Company and holds 140 shares first preferred stock, 40 shares second preferred stock and 523 shares common stock of that company (Master's Report, par. 22); that he is president and manager of the Buff & Buff Manufacturing Co. and holds "a large number of shares of the capital stock thereof" (Master's Report, par. 23).

That said Drake is the owner of 100 shares preferred stock of Mullins Manufacturing Company (Master's Report, par. 25); that he is the holder of unrecorded deeds conveying to him a large number of parcels of land which stand of record in the names of various nominees of said Drake (Master's Report, pars. 26 and 27); that said Drake holds various mortgages on real estate aggregating in amount approximately one hundred and fifty thousand dollars ($150,000) (Master's Report, par. 28); and that, at the date of the filing of the bill of complaint, said Drake had deposits in the Atlantic National Bank of Boston, Waltham Trust Company and in the First National Bank of Portsmouth, New Hampshire (Master's Report, par. 28).

9. That in said Superior Court proceedings said Raphael obtained and now has attachments upon property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him, and that said Raphael has a legal right to reach and apply in said proceedings so much of said property covered by said attachments and injunctions as may be necessary to satisfy his said claim against said Drake and Buff; that the granting of the orders prayed for in the receiver's motion will deprive said Raphael of substantial rights, and will result in great and irreparable loss to him.

10. That said Raphael has done nothing to affect, in any way, his right to proceed with said Superior Court pro-

ceedings; that in reliance upon and in pursuance to the [fol. 40] order entered by this court on March 24, 1931, authorizing said Raphael to institute proceedings on said bond, said Raphael has expended large sums of money and much time and effort in instituting and prosecuting said Superior Court proceedings, and that it would be inequitable and unjust now to modify said decree of March 24, 1931.

11. That George B. Monroe, the receiver of said Monroe Stores, Inc., has no legal interest or standing to entitle him to any order or decree to halt or interfere with said Superior Court proceedings; that he is not a party to said proceedings, either individually or as receiver, that he has no interest in the claim of said Raphael, and is not entitled to be heard in reference to the prosecution by said Raphael of said Superior Court proceedings.

12. That said receiver in no way represents said Raphael in connection with any proceedings on said bond, and has at no time been authorized by said Raphael to bring any proceedings in his behalf; that on April 16, 1931, when said receiver filed in this court the ancillary bill of complaint referred to in his motion, said Superior Court proceedings had already been commenced and were pending; that said Raphael was not made a party to said ancillary bill of complaint, that he is not mentioned therein, that his claim is not referred to therein, and that he has never taken any part in any hearings thereon or in the contempt proceedings referred to in said motion.

13. That said Raphael is not a resident of the Commonwealth of Massachusetts but resides and has his usual place of business in New Britain, in the County of Hartford, in the State of Connecticut; that no personal service has been made upon said Raphael in these proceedings.

14. That said receiver having had knowledge of the entry by this court of said order of March 24, 1931, authorizing said Raphael to sue said Dempsey, Drake and Buff and of the institution and prosecution by said Raphael of said Superior Court proceedings in pursuance to said order, said receiver is barred on principles of laches and estoppel from now attempting to obtain a modification of said order.

15. That said Raphael is not interferring or attempting [fol. 41] to interfere in any way with said receivership; that he is only seeking to obtain payment of the amount justly due him from said Dempsey, Drake and Buff; that, on the contrary, the motion filed by the receiver is an attempt to interfere with the pursuit by said Raphael of his lawful remedies against said Dempsey, Drake and Buff; that said receiver has already disposed of all the property of Monroe Stores, Inc., which came into his hands, and that he has no right to attempt to shield Dempsey, Drake or Buff from being compelled to pay to said Raphael the amount justly due to him, as aforesaid; that said Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors of said Monroe Stores, Inc., whose claims have been proved and allowed; that said Drake and Buff are therefore amply able forthwith to pay said obligation to said Raphael as they are in law bound to do, and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them.

Wherefore said Raphael files this plea upon the return of the order to show cause, and prays that said motion filed by said receiver be denied.

By His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Benjamin Goldman. Jurat omitted in printing.

[fol. 42] A

Commonwealth of Massachusetts,
Suffolk, ss:

Superior Court

In Equity. No. 37782

United States of America ex Rel.

v.

Harold A. Dempsey et al.

Stipulation

It is hereby stipulated and agreed that the "Motion to Dismiss" heretofore filed by the defendants Dempsey, Buff

and Drake be and the same hereby is waived; that an answer in behalf of the above named defendants be filed on or before June 22, 1931.

Mark M. Horblit, Attorney for Plaintiff. Ralph H. Robb, Attorney for Defendants.

B

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

No. 37782. Equity

UNITED STATES OF AMERICA on Relation of LOUIS RAPHAEL

v.

HAROLD A. DEMPSEY et al.

MASTER'S REPORT

Pursuant to an order of reference of the Superior Court, a bill of complaint of the United States of America, on relation of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, versus Harold A. Dempsey and Louis F. Buff, both of Boston, Massachusetts, Clifford S. Drake of Northampton, New Hampshire, having a usual place of business in said Boston, Laundry Machinery Co. and W. E. Noyes Co., both corporations organized under the laws of the Commonwealth of Massachusetts and both having a usual place of business in said Boston, was referred to me as Master to hear the parties and their evidence and report my findings to the Court with such facts and questions of law as either party may request.

[fol. 43] By virtue of the reference I heard the parties and their evidence and make report thereof to the Court as follows:

The plaintiff's bill of complaint alleges that:

Louis Raphael, relator, is a resident of New Britain, County of Hartford, State of Connecticut; the defendants, Harold A. Dempsey and Louis F. Buff, are residents of

Boston, County of Suffolk, Commonwealth of Massachusetts; the defendant, Clifford S. Drake, is a resident of Northampton, County of Rockingham, State of New Hampshire, and has a usual place of business in said Boston.

On July 14, 1930, a bill in equity was filed in the United States District Court for the District of Massachusetts by J. B. Hirshfield Co., Inc., against Monroe Stores, Inc., a Massachusetts corporation, praying for the appointment of a receiver of the Monroe Stores, Inc.

On July 23, 1930, the United States District Court for the District of Massachusetts appointed George M. Monroe of Quincy, Massachusetts, receiver.

On November 10, 1930, the receiver filed a petition for leave to sell the assets and property of the Monroe Stores, Inc., which petition was duly allowed on November 12, 1930, and thereafter the Court received a bid, submitted in writing by Harold F. Dempsey, defendant, whereby the said Dempsey offered, as a consideration of the sale of the assets to him by the receiver, to pay all the creditors of the Monroe Stores, Inc., a sum equal to thirty (30) per cent of their respective claims in or within thirty (30) days after their claims had been proved and allowed, and as a part of said bid offered to file with the said Court a bond with good and sufficient sureties in the penal sum of one hundred thousand ($100,000) dollars, the condition of said bond being that if said Dempsey performed the obligations of the bid, the bond was to be null and void, otherwise the bond was to remain in full force and effect, the sureties thereon to be held liable.

On November 26, 1930, a decree was entered by the Court ordering the receiver to accept the offer of the said Dempsey and to execute a bill of sale of all of the assets of the Monroe Stores, Inc., to him, pending the filing by the said Dempsey of a bond in the penal sum of one hundred thou- [fol. 44] sand ($100,000) dollars with good and sufficient sureties.

On December 2, 1930, the said Dempsey did file in Court a bond in the penal sum of one hundred thousand ($100,000) dollars and by the terms of said bond said Dempsey was principal and the defendants, Louis F. Buff and Clifford S. Drake, were sureties, binding themselves in the full and just sum of one hundred thousand ($100,000) dollars to cover the performance by the said Dempsey of all

the conditions set forth in the offer, whereupon the receiver executed unto the said Dempsey a bill of sale conveying to him all the assets of the Monroe Stores, Inc.

On August 18, 1930, the United States Court issued an order requiring all persons having claims against the Monroe Stores, Inc., to present their proofs of claims to the receiver for allowance on or before September 30, 1930, which time fixed for the allowance of claims was extended to November 15, 1930.

On September 25, 1930, the plaintiff presented to the receiver a proof of claim, and on February 9, 1931, the claim was proved and allowed in the sum of thirty-five thousand ($35,000) dollars, and the defendants, through their counsel, assented in writing to the allowance of said claim; the plaintiff was thereupon entitled to receive from the said Dempsey within thirty (30) days the sum of ten thousand five hundred ($10,500) dollars, being (30%) per cent of the amount in which the claim was allowed, namely thirty-five thousand ($35,000) dollars, and the plaintiff made demand on March 12, 1931, for the payment of same, and received the sum of twelve hundred ($1,200) dollars, leaving a balance due him of ninety-three hundred ($9,300) dollars with interest from March 12, 1931.

The defendant Buff is the owner of capital stock of the Laundry Machinery Co.

The defendant Drake is the owner of stock in a number of corporations unknown to the plaintiff.

The said Dempsey sold and transferred the assets received by him from the Monroe Stores, Inc., to a new corporation known as W. E. Noyes Co. in consideration of issu-[fol. 45] ing to the said Dempsey or his nominee certificate of shares of the capital stock of the W. E. Noyes Co. A portion of the said stock was issued to the defendants Drake and Buff.

The plaintiff seeks to reach and apply the stock of the defendants in the W. E. Noyes Co.

The plaintiff received a commission by virtue of an order entered by the United States authorizing him to institute and prosecute these proceedings on the bond in the name of the United States of America.

During the trial before the Master, the plaintiff moved to amend his bill of complaint, alleging that Louis Buff, defendant, was the owner of stock in the Babson Dow

Machinery Co. and Buff and Buff Manufacturing Co., both Massachusetts corporations, setting forth in his amendment that the defendants Buff and Dempsey, in consideration of the conveyance to the said W. E. Noyes Co. received an indemnity agreement from the said W. E. Noyes Co. for the payment to them for any liability or loss or damage on their bond.

The plaintiff further alleged in said amendment that said Dempsey was indemnified by the W. E. Noyes Co. from any loss that he sustained, and further that the defendant Drake held property in the names of various straws, which property belonged to the said Drake and that said straws had no beneficial interest in the property.

The plaintiff further prays that all of the properties set forth in the amended bill of complaint be reached and applied in satisfaction of the indebtedness.

Defendants' Answer

The defendants plead ignorance as to the allegations contained in paragraph 1 of the plaintiff's bill of complaint as to the residence of the plaintiff.

The defendants admit the allegations contained in paragraph 2, stating that the defendants Dempsey and Buff are residents of Boston, and the defendant Drake a resident of Northampton, New Hampshire.

[fol. 46] The defendants plead ignorance as to the allegations contained in paragraph 3 relative to the filing of the bill in equity in the United States Court against the Monroe Stores, Inc. and the appointment of a receiver.

The defendants admit the allegations contained in paragraph 4 relative to the petition for leave to sell the assets and the allowance of same. The receipt of sealed bids for the property and the bid of the defendant Dempsey, and the offer of thirty (30%) per cent to be paid to creditors, and the giving of the bond in the sum of one hundred thousand ($100,000) dollars.

The defendants neither admit nor deny the allegations contained in paragraph 5 relative to the acceptance of a bid by the Court and the giving of a bond in the sum of one hundred thousand ($100,000) dollars.

The defendants admit the allegations contained in paragraph 6 relative to the giving of a bond in the sum of one

hundred thousand ($100,000) dollars with the said Dempsey as principal and the defendants Buff and Drake as sureties for the full performance of the conditions of the offer, the approving of said bond by the Court and the execution and delivery by the receiver of a bill of sale to the said Dempsey.

The defendants plead ignorance as to the allegations contained in paragraph 7 relative to the filing of claims under order of the Court on or before September 30, 1930, which time was extended to November 15, 1930, and the presenting of a claim by the plaintiff to the receiver which was allowed in the sum of thirty-five thousand ($35,000) dollars, to which all parties assented, and on which the plaintiff was entitled to receive within thirty (30) days the sum of ten thousand five hundred ($10,500) dollars, thirty (30%) per cent of the amount in which the plaintiff's claim was allowed, payment of the sum of twelve hundred ($1,200) dollars to the plaintiff, leaving a balance due of ninety-three hundred ($9,300) dollars with interest from March 12, 1931.

The defendant Louis F. Buff denies the allegation contained in paragraph 8 that he was the owner of any stock in the Laundry Machinery Co.

[fol. 47] The defendant Clifford S. Drake denies the allegation contained in paragraph 9 that he was the owner of stock in various corporations unknown to your plaintiff.

The defendants deny allegations contained in paragraph 10, stating that the defendant Dempsey owns no shares of stock of the W. E. Noyes Co., and that the defendants Buff and Drake are not owners of any stock of the W. E. Noyes Co.

The defendants deny allegations contained in paragraph 11 relative to the plaintiff suffering irreparable damage.

The defendants are ignorant of the allegations contained in paragraph 12 relative to the permission of the plaintiff to institute and prosecute proceedings.

I find the following facts:

1. On March 24, 1931, the plaintiff called the relator, filed in the United States District Court for the District of Massachusetts, a petition for leave to institute and prosecute proceedings in the name of the United States of America upon a bond given by the defendant Dempsey, as

principal, and the defendants Buff and Drake as sureties, being bond in issue in this action, a copy of which is hereto annexed marked "Exhibit C", and a decree authorizing such proceedings was duly entered by said United States District Court on said date.

2. On July 14, 1930, a bill in equity was filed in the United States District Court by creditors against the Monroe Stores, Inc., a Massachusetts corporation, praying for the appointment of a receiver of Monroe Stores, Inc.

3. On July 23, 1930, said Court appointed George B. Monroe of Quincy as receiver of the assets and property of said Monroe Stores, Inc.

4. On August 18, 1930, said Court issued an order, fixing September 30, 1930, as the date on or before which proofs of claim against said Monroe Stores, Inc., were to be presented to the receiver for allowance. The date fixed in said order was later extended to November 15, 1930.

5. On September 25, 1930, the plaintiff duly presented his proof of claim to the receiver, and on February 9, 1931, [fol. 48] said proof of claim was duly allowed in the sum of thirty-five thousand ($35,000) dollars, the individual defendants, by their counsel, assenting to such allowance.

6. Early in November, 1930, said receiver filed in said Court a petition for leave to sell all the assets and property of said Monroe Stores, Inc., which petition was duly allowed on November 12, 1930; thereafter, said receiver duly advertised for bids and on November 26, 1930, the bids received by the receiver were submitted and considered in open Court.

7. The defendant, Harold A. Dempsey, made a bid for the property of Monroe Stores, Inc., wherein he offered to pay creditors of said Monroe Stores, Inc., thirty (30%) per cent of their respective claims in or within thirty days after the same were filed and allowed, and offered to file a bond in the penal sum of one hundred thousand ($100,000) dollars with sureties to secure the performance of the terms and conditions of his bid. A copy of said bid is hereto annexed marked "Exhibit A", and a copy of the order thereon is hereto annexed marked "Exhibit B".

8. On November 26, 1930, the United States District Court for the District of Massachusetts entered a decree wherein the receiver was directed to accept the bid submitted by the said Dempsey and authorized the receiver to transfer the assets of the said Monroe Stores, Inc., upon the filing and approval of the bond.

9. The defendant Dempsey was merely a straw and nominee for the defendants Buff and Drake, and had no financial interest other than he was acting for them to purchase the property.

10. On December 2, 1930, the said Dempsey filed in the United States District Court for the District of Massachusetts, a bond in the penal sum of one hundred thousand ($100,000) dollars wherein the sureties named are Louis F. Buff and Clifford S. Drake. Said bond was signed, executed and delivered by the said Buff and Drake who qualified before one of the clerks of the United States Court as to the property they owned. The said Buff and Drake swore to statements of ownership of property as set forth in said bond. A copy of said bond, and statements of [fol. 49] qualifications of said Buff and Drake are hereto annexed marked "Exhibits C, D and E", respectively.

11. Upon the approval of said bond on said date by the Court the receiver transferred all of the assets of the Monroe Stores, Inc., to the said Dempsey.

12. On February 9, 1931, all of the claims presented to the receiver for allowance were allowed or disallowed with the consent and approval of the defendants, Dempsey, Drake and Buff.

13. The said Dempsey acted at the request of the said Buff and Drake as their agent, and acquired the property of Monroe Stores, Inc., at their request.

14. The defendant Dempsey received from the defendants Drake and Buff a bond dated December 2, 1930, in the penal sum of one hundred thousand ($100,000) dollars by the terms of which he was indemnified against any liability or loss as the result of the offer, and on the bond which the said Dempsey signed as principal in the United States District Court.

15. In addition to the bond filed by the said Dempsey, the sum of twenty thousand ($20,000) dollars was deposited as a part of the purchase price with the receiver, which monies were furnished by the defendants Buff and Drake in equal shares.

16. After the delivery of the assets of the Monroe Stores, Inc., the defendants Buff and Drake, through their counsel Thomas W. Morris, Esq., organized a Delaware corporation known as the Monroe Stores Corporation, and the said Dempsey, at the direction of Buff and Drake, assigned and transferred all of the assets of the Monroe Stores, Inc., to the Monroe Stores Corporation.

17. The said Monroe Stores Corporation was authorized to issue preferred stock Class A and B, the latter being a voting stock, for the transfer to it of all the assets purchased by the said Dempsey from the receiver of the Monroe Stores, Inc.

18. There was issued to the said Dempsey for the property one thousand (1000) shares of Class B stock and two (2) promissory notes for twenty-five thousand ($25,000) dollars each, in which Dempsey was named as payee. In addition, the Monroe Stores Corporation gave unto the said Dempsey an agreement to save him harmless from all obli- [fol. 50] gations of the offer made for the purchase of the Monroe Stores, Inc., property and his being principal on the bond, and a similar agreement was given by the said corporation to the defendants Buff and Drake.

19. Upon receipt of the promissory notes the said Dempsey endorsed and delivered the same to Buff and Drake. Later on one thousand (1,000) shares of Class B stock was surrendered, and other shares were issued as follows:

Ida M. Hodsdon, nominee of Drake	25 shares
Louis F. Buff	125 "
Clifford S. Drake	125 "
Priscilla French, stenographer in employ of Morris & Robb, Esqs.	150 "
Thomas W. Morris, Esq.	116 2/3

At the time of the filing of the bill in equity the said defendants Buff and Drake still held the certificates of said stock.

20. The defendants Buff and Drake and attorneys Robb and Morris are the only officers of the Monroe Stores Corporation, which corporation changed its name to W. E. Noyes Co. on December 31, 1930. The defendants Drake and Buff and attorneys Robb and Morris constitute the Board of Directors of the W. E. Noyes Co.

21. On December 2, 1930, the said Buff was and he is still the president and treasurer of the Henrici Laundry Machinery Co., a Massachusetts corporation having a usual place of business at 61 West Selden Street, Mattapan, and that the defendant Buff owns and holds certificates standing of record in his own name for shares of stock in par value the sum of one hundred fifty thousand ($150,000) dollars in the said company.

22. The defendant Buff is also president and treasurer of the Babson Dow Manufacturing Co., a Massachusetts corporation having a usual place of business at 60 Fulda Street, Roxbury, and he owns and holds certificates standing of record in his own name for 140 shares of the first preferred stock, 40 shares of the second preferred stock and 523 shares of common stock in the said company.

[fol. 51] 23. The defendant Buff is president of the Buff & Buff Manufacturing Co., a Massachusetts corporation having a usual place of business at 329 Lamartine St., Jamaica Plain, and he is manager of said corporation and holds a large number of shares of the capital stock thereof.

24. It was agreed by counsel for the defendants that the said Buff would appear for examination, and said counsel made a statement in open Court that he had requested Buff to testify but he had refused to submit to an examination. Plaintiff attempted to subpoena the said Buff but he was unable to get service on him.

25. The defendant Drake owns one hundred (100) shares of prefered stock of the Mullins Mfg. Co., a foreign corporation having a usual place of business in Salem, Ohio, and he still owns the shares of Class B stock issued to him and his nominees by the W. E. Noyes Co.

26. The defendant Drake has been and is engaged in the real estate business, particularly in buying tax titles, and he owns various parcels of real estate acquired through tax

titles in the counties of Suffolk, Middlesex, Norfolk and Essex, which parcels stand in the names of nominees of the said Drake who have paid no consideration therefor and hold record title for his benefit. The names of some of the nominees in whose names properties are held for the benefit for the said Drake are:

Ida M. Hodsdon, Ossippee Center, New Hampshire.
Harriet K. Evans, Wellesley, Massachusetts.
Reginald G. Hodsdon, Rutland, Vermont.
Louise C. Casselman, otherwise known as Louise C. Kitendaugh, Cleveland, Ohio.
Esther M. Dolan, Medford, Massachusetts.
Charlotte M. Hodsdon, Ossippee Center, New Hampshire.

27. The defendant Drake holds in his possession unrecorded deeds from the respective nominees to himself as grantee of property as shown by schedule hereto annexed marked "Exhibit F". There are no mortgages on any of the parcels, except the last four parcels set forth in the schedule.

28. The defendant Drake had on the date of the filing of [fol. 52] the bill of complaint and still has deposits of moneys to his personal credit in the Atlantic National Bank of Boston, Waltham Trust Co. of Waltham, Mass., and the First National Bank of Portsmouth, New Hampshire, and he has various mortgages on real estate aggregating in the amount of approximately one hundred fifty thousand ($150,000) dollars.

29. On March 12, 1931, the plaintiff, through his counsel, demanded from said defendants payment of ten thousand five hundred ($10,500) dollars on the amount of his claim of thirty-five thousand ($35,000) dollars, and the defendants Buff and Drake shortly thereafter paid to the plaintiff twelve hundred ($1,200) dollars on account of said dividend, leaving a balance of ninety-three hundred ($9,300) dollars due to the plaintiff from the said Buff and Drake.

30. The defendants, Buff, Drake and Dempsey, owe the said plaintiff the sum of ninety-three hundred ($9,300.00) dollars with interest from March 12, 1931.

31. The defendant Drake testified that the only reason he had for not paying the balance due the plaintiff was be-

cause he has an agreement from the Monroe Stores Corporation to save him harmless.

Respectfully submitted.

—— ——, Master.

C

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

In Equity. No. 37782

UNITED STATES OF AMERICA ON RELATION OF LOUIS RAPHAEL, of New Britain, in the County of Hartford, in the State of Connecticut, Plaintiff,

v.

HAROLD A. DEMPSEY, of Boston, in the County of Suffolk, in the District of Massachusetts; Louis F. Buff, of said Boston, and Clifford S. Drake, of Northampton, in the County of Rockingham, in the State of New Hampshire, Having His Usual Place of Business in said Boston, Defendants

DEFENDANTS' MOTION TO RECOMMIT CASE TO MASTER

Now come the defendants in the above-entitled action and [fol. 53] move that this case be recommitted to the Master on the ground that a Motion of the defendants to dismiss the case is on file and that said Motion is still pending.

By Their Attorney, —— ——.

D

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPERIOR COURT

In Equity

UNITED STATES OF AMERICA ON RELATION OF LOUIS RAPHAEL, of New Britain, in the County of Hartford, in the State of Connecticut, Plaintiff,

v.

HAROLD A. DEMPSEY, of Boston, in the County of Suffolk, in the District of Massachusetts; Louis F. Buff, of said Bos-

ton, and Clifford S. Drake, of Northampton, in the County of Rockingham, in the State of New Hampshire, Having His Usual Place of Business in said Boston, and Laundry Machinery Company and W. E. Noyes Co., Both Corporations Organized under the Laws of Massachusetts and Both Having a Usual Place of Business in Boston, in the County of Suffolk, in Said Commonwealth, Defendants

MOTION TO AMEND DEFENDANTS' ANSWERS

Now come the defendants and move that they may be allowed to amend their answers filed in the above entitled case as follows:

13. And further answering these defendants say that on or about April 16th, 1931 the Receiver for the Monroe Stores, Inc. filed in the District Court of the United States for the District of Massachusetts in re J. B. Hirshfeld & Co. Inc. v. The Monroe Stores Inc. in Equity #3293 an ancillary bill of complaint in which it was set forth that the defendants in this action had failed to pay among other things the amount claimed in this suit as set forth in the bill of complaint in this action. Thereupon on or about the 16th day of July, 1931 a decree was entered in the said District Court of the United States upon said ancillary bill of complaint rendering judgment against the defendants in this action for the benefit, among others, of this plaintiff Louis Raphael in the [fol. 54] sum of Thirty-three thousand twenty-six dollars and eighty-three cents, ($33,026.83) which sum includes the amount due in this suit and execution has issued therefor.

14. Wherefore these defendants say that this bill of complaint should be dismissed against them as the matter has become res adjudicata.

By Their Attorney, —— ——.

On the said third day of December, said cause comes on to be heard on the aforementioned plea of Louis Raphael, the Honorable James A. Lowell, Circuit Judge, sitting.

In United States District Court

Stenographic Transcript of Hearing on Motion to Modify Order Entered March 23, 1931

Before Lowell, J.

Appearances:

Andrew J. Aldridge, Esq., Counsel for Receiver;
Mark M. Horblit, Esq., representing Louis Raphael;
Ralph H. Robb, Esq., representing Louis F. Buff and Clifford S. Drake;
T. H. Stearns, Esq., representing Clifford S. Drake.

Federal Building,
Boston, Mass., December 3, 1931—10 A. M.

Mr. Aldridge: If the court please, this motion that I have before the court this morning is to modify the order entered by this court on March 23, permitting Louis Raphael, one of the creditors of the Monroe Stores, to bring suit in the Superior Court, Commonwealth of Massachusetts. At the time that that order was issued no suit on behalf of the creditors of the corporation was pending in this court. Later a suit was brought and judgment was entered for $33,026.89, being the balance due the creditors of The Monroe Stores, Inc. $9,300 of that amount represents a claim of Louis Raphael, being the balance due him. He proved his claim for $35,000, and by agreement of counsel representing the receiver and Mr. Raphael he was to have—in other words, his claim was for the principal amount of $10,500. He was paid $1,200 on that and the balance is now due him and has been due for some time. The position that counsel for the [fol. 55] receiver takes in this question is this——

The Court: I have forgotten what has been done in the State court.

Mr. Aldridge: The master's report has been confirmed by the court and it is now up on motion for entering a final decree. My objection is to the final decree because it provides that after 30 days after the entry of that decree unless the full amount of $9,300 is paid with interest and costs, that the two defendants Buff and Drake turn over all of their property to a special master to be appointed by that court.

Now, Mr. Horblit is entitled to his money without question, but the other creditors are also entitled to their money. On October 19, I cited Mr. Buff and Mr. Drake in for contempt of court for failure to carry out their agreement, and upon their agreeing to pay $1,000 per month they were not held in contempt, but the court held the petition for further orders of the court unless they did comply with that order. Now, they have paid two payments required under that, and there is in the possession of the counsel for the receiver approximately $3,400. They were at the same time ordered to transfer a claim that they had against the Noyes Company for approximately $33,000. That claim was contested on the ground it was merely a special contract that they had and not an agreement to save them harmless; also that the Noyes company was entitled to credits against the claim.

I succeeded in having a conference with Mr. Hannify, who represents the trustee in bankruptcy on that case, and I have agreed on $12,500 in proof of that claim if he would recommend that amount. It has not been approved by the referee yet. That will amount to approximately $4,000, which will give us approximately $7,000 to be credited against the judgment. They have approximately two or three thousand dollars worth of claims to be applied against the judgment.

The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate [fol. 56] because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case.

The Court: The only thing is, have you brought that matter to the attention of the State court?

Mr. Aldridge: I tried to. The court put us over and then I brought this petition and advised the court up there that a temporary restraining order had been issued and order of notice issued by this court. That case comes up again Monday after the hearing on this petition.

The Court: Well, supposing I wanted to grant an order?

Mr. Aldridge: The order would be this, it would be against the plaintiff Raphael and his counsel, enjoining

them from proceeding further in that case except to reduce their claim to judgment. I think they are entitled to that.

The Court: Then I shouldn't be interfering——

Mr. Aldridge: With the process of that court at all.

The Court: All right.

Mr. Robb: If your Honor please, I appear for Mr. Drake, one of the defendants, or our office does. We did call this matter to the attention of the State court and in a motion to reopen the master's report, that is, to have it recommitted to him, setting out that the $9,300 which was found by the master as due Raphael from Buff and Drake was included in this judgment of $33,000 in the United States District Court. The position of the State court seemed to be that it is all right since the master had found that $9,300 was due in the State court, but he said this: "I am aware that I do not have to pass on the final decree when it comes up, as to what they will do with it. That is for another court."

Now, we have also filed another motion setting out the facts, that this suit started in the United States District Court, that a judgment has been obtained here, including the amount which is found due Raphael in the State court and asking that the decree confirming the master's report be vacated and that the master's report be recommitted to show the facts that there is a judgment in the United States [fol. 57] District Court and that an execution has issued and that a demand has been made, and also show the further facts that they were cited into contempt and they are paying the judgment in which Raphael's claim is included in the United States District Court to the receiver of The Monroe Stores appointed by the United States District Court. That is in the records of the State court.

The Court: Well, has that motion been acted on by the State court?

Mr. Robb: The motion came up last Monday and at that time this temporary order was out. It came to the court's attention and Mr. Horblit's attention and the case went over until next Monday, but it has been called to their attention, however.

Mr. Horblit: May it please your Honor, I have filed here a plea setting forth the facts with respect to the proceedings in this case. I would like to call to your Honor's attention the following situation:

On February 9, 1931, the claim of Raphael was allowed, as Mr. Aldridge has said, in the sum of $35,000, and there was thereupon due him within 30 days thereafter under the provision of the bond $10,500, being 30 percent, as your Honor will recall, that these sureties on the bond agreed to pay. Now, they paid $1,200 and they have to pay the rest. We thereupon came before your Honor with a petition setting forth the facts and asked for leave to institute proceedings on the bond and your Honor entered an order to that effect on March 24, 1931.

Now, acting under this order and in pursuance thereto Raphael brought the proceedings in the Superior Court and has expended a great deal of effort and time and money in prosecuting those proceedings. We had long hearings before a master. At those hearings before the master the receiver that was appointed by this court was called by me to testify as a witness, and he attended the hearing before the master that was held on July 7, 1931. Mr. Aldridge, the receiver's counsel, was called by me as a witness before the master and he testified. Nothing was said at any time during this whole period about any modification of that order and we went on relying upon the order that this court has [fol. 58] given us, and finally after many hearings have obtained a confirmation of the master's report. That is annexed to the paper which I have filed, and I call to your Honor's attention that the master's report recites—and I have summarized his recital in paragraph 8, which is on page 4 of the paper which your Honor has before you—that these defendants Buff and Drake have showed that they have very substantial sums of money. I call to your Honor's attention that Buff is found to have been treasurer and president of the Henrici Laundry Machine Company and has stock there amounting to $150,000, and is president and treasurer of the Babson-Dow Manufacturing Company and holds second preferred stock and common stock of that company, and that he also holds a large number of shares of stock of Buff & Buff Manufacturing Company.

Now, he has found as to Drake that he holds $150,000 of mortgages, that he owns a large number of parcels of land.

The Court: I guess those gentlemen showed they were too rich.

Mr. Horblit: Well, your Honor, Drake testified before the master and these are findings that were based on the

testimony before the master; so that it appears affirmatively, your Honor, that they have a substantial amount of property, much more than is sufficient to pay the claim of Raphael and the claims of all the other creditors.

Now, I would like to urge upon your Honor whether or not it is equitable or fair at this time, after Raphael has gone to this expense of these hearings under an order of this court, for the receiver to come in here and say that the order should be modified. All we are seeking to do is to recover from these defendants the amount which this court has said and which the Superior court has said is justly due to Raphael.

The Court: Supposing you did recover, what will you get in the way of costs, and so forth?

Mr. Horblit: In the way of costs?

The Court: Yes.

Mr. Horblit: From the Superior Court?

The Court: Yes.

[fol. 59] Mr. Horblit: Mr. Aldridge says about $360 interest. For a rough guess on cost, your Honor, we say $100, I think, would be what it would bring.

The Court: If I grant this order what you would lose would be $460?

Mr. Horblit: Something like that, and we will also lose this, your Honor: We have attachments in the State court. Now, those attachments expire 30 days after the judgment.

The Court: Has judgment been entered?

Mr. Horblit: No, your Honor, but it will be because the master's report is confirmed. It is right for a final decree.

Now, I want to call also to your Honor's attention that the suit was commenced here by the receiver after your Honor had granted Raphael the right to sue and suit had been commenced. In other words, they are asking the court to do something that is most unusual, and I am quite certain that they cannot find a single authority to support them, namely, that where a court has given leave to sue and where the suit has gone on in pursuance of an order of this court, under leave of this court, that such condition can be changed. They are now asking the court to modify the order; that is, after the plaintiff, Raphael, has changed his position and has gone ahead with the suit and has obtained attachments; asking him to lose all those attachments, al-

though what he has done has been in pursuance of an order of this court. I have searched the books.

The Court: Not in pursuance of an order; in pursuance of a permission.

Mr. Horblit: I mean in pursuance of leave of this court to sue. He didn't take it upon himself to bring the suit without leave of this court. He came in here first on this petition, which we filed here and obtained the leave, and has gone ahead accordingly. It seems to me, your Honor, that the persons that are really interested in having this motion allowed are the defendants Drake and Buff, who do not want to pay as they should pay out of the property which they hold.

The Court: Tell me, Mr. Horblit, how are you preju-
[fol. 60] diced? Tell me in dollars and cents, or in any way you want, if I grant the injunction how will it affect you.

Mr. Horblit: If your Honor please, in reply to your question I will say this first: I call to your Honor's attention the attachments that we have, which attachments we are losing if this court should grant the order. Secondly, we will have to wait a great deal of time before we can get the money in pursuance to the order of this court, because, as I understand it, there have been some orders made here although we had no notice and no chance to be heard. I understand that Mr. Buff has never been examined by this court, and he refused to appear as a witness in the other proceedings. We will have to wait a great deal of time in order to collect the money, whereas we could, as we believe, collect it immediately from Buff.

Furthermore, there is the interest. As I understand it, Mr. Aldridge took a list of the allowed claims that have not been paid and computed 30 per cent of those claims and had the order here allowed for the amount of that 30 per cent without computing interest. Now, under the order of this court, as I have been recently informed, they are not to pay more than a thousand dollars a month. That would take nearly three years to pay. Now, Raphael will sustain substantial loss during that time; the interest will amount to considerable, and he could get his money immediately in the other court. In other words, your Honor, what we are doing is not anything except to compel the sureties on the bond,—who have certainly dealt fast and loose with the receiver in the past in connection with the obtaining of

property and filing of a bond, and then not paying creditors as they had agreed to do but compelling them to bring suit,—to pay us what is due. I submit these parties should not be protected from judgments, which Raphael is justly entitled to, because of their claim,—and I say it is their claim because they are here represented by counsel,—that would interfere with their payments, when it appears that the findings of the master's report were confirmed and there were no objections or exceptions filed to the master's report by either Drake or Buff. They raised no objection [fol. 61] to the finding, so that the findings in the master's report which I have cited in the plea which I filed, have been confirmed without any objection on the part of Drake or Buff. They show affirmatively that Drake and Buff are well able to pay the amount of money that is due.

Now, we say furthermore, your Honor, that it is not fair at this time, after all this litigation and after the expense to which Raphael has been put, the receiver and Drake having known of all this, to say now that Raphael can't get the fruits of his litigation. I submit, your Honor, that to change the position at this time would be inequitable. We say further that so far as Raphael is concerned that the amount of money which Buff will have to pay at this time will not interfere with the payments ordered by this court of a thousand dollars a month; that he is reputed to be a man who is worth several hundred thousand dollars. Why, your Honor, when they obtained the bond they filed a statement showing that they are worth a great deal of money, and it was on that basis that they were qualified as sureties on the bond.

Now, should these sureties be protected against a just claim, and the plaintiff Raphael, who acted in pursuance to the leave granted by this court, be prejudiced on that account? I submit, your Honor, that Raphael is entitled, having acted under the leave of this court to proceed with his case, and that these sureties on the bond should not be protected or aided by any modification of the order at this time.

The Court: Could an arrangement like this be made, Mr. Aldridge, that Raphael, when paid, should be paid the amount which he would now recover plus interest?

Mr. Aldridge: I asked Mr. Robb that question, would Mr. Buff and Mr. Drake agree to pay Raphael the three hundred

and some odd dollars interest plus his court cost in the Superior Court, and they both said they would.

The Court: Well, then, he ought also to have——

Mr. Aldridge: My answer carries interest——

The Court: From the date of entry.

Mr. Aldridge: They said they would be. There are one or two things that I wanted to clear up. Mr. Horblit called [fol. 62] the court's attention to the fact that I testified in this case. I did testify in that case as Mr. Horblit's witness. I also called the master's attention to the fact that I had a case pending in this court in behalf of some claims and I exhibited to the master in that case an agreement between counsel for the receiver and counsel representing the defendants that they would give me a judgment as soon as they could compute the amount of it, and that judgment, according to that agreement, was entered on the tenth day of July this year.

Now, there is one other thing. The attachments will not be lost because your Honor will recall you issued a very stringent injunction in this case preventing these gentlemen from in any way disposing of that property. That injuction still stands today. That injunction was issued at the time of the filing of the ancillary bill of complaint in this case. Nothing could be done, this court having original jurisdiction in the matter. No one could move on that. As a matter of fact I don't think the sheriff of Suffolk County could touch any of this property without being in contempt of court, with that injunction still standing.

The Court: What do you ask me now to do?

Mr. Aldridge: I ask you to issue an injunction against further proceedings in the State court, allowing Mr. Horblit to reduce his claim to a judgment in the State court but proceeding no further.

The Court: Do you want to say any more, Mr. Horblit?

Mr. Horblit: If your Honor please, I would like to call to your Honor's attention some other things that I neglected to say in my first remarks, that is this: The defendants in the Superior Court case, Drake and Buff, filed a motion to recommit the master's report, which was heard and denied, and I have annexed a copy of the motion to the plea which I filed before your Honor. That was denied on October 20, 1931, and no appeal has been taken from that.

Now, they also filed a motion setting forth the pendency

of the ancillary bill of the receiver against them in this court. The court denied that motion for this reason, that Raphael was not a party to those proceedings and therefore could not be bound by those proceedings or prohibited [fol. 63] or interfered with by them, not having been heard on them, receiving no notice and having had no opportunity to be heard either in those proceedings or in the contempt proceedings. In other words, what they are attempting to do is to estop a party from proceeding with his suit by reason of another suit to which he is not a party.

The Court: Well, you are not a party in a way and in a way you are. This includes your claim as much as anybody else's claim.

Mr. Horblit: Raphael is not mentioned in the ancillary bill, and your Honor will recall, as I stated before, that the ancillary bill was commenced after his proceedings, not before.

The Court: I understand that. What is your exact motion, Mr. Aldridge?

Mr. Aldridge: That further proceedings in the State court be enjoined.

The Court: All right. The motion is granted.

Mr. Horblit: Your Honor, may my rights be saved?

The Court: Surely.

[Adjourned.]

Approved for printing.

A. J. Aldridge, Attorney for George B. Monroe, Receiver. Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael, Appellant.

IN UNITED STATES DISTRICT COURT

ORDER FOR INJUNCTION, ETC.—December 7, 1931

LOWELL, J.:

This cause came on to be heard at this sitting, upon the receiver's motion and upon the plea filed thereto, was argued by counsel and thereupon, upon consideration thereof, it was ordered that the order dated March 23, 1931, [fol. 64] whereby Louis Raphael was permitted to sue Har-

old A. Dempsey, principal, Louis F. Buff and Clifford S. Drake, sureties on the bond filed by said Harold A. Dempsey in this cause, be and the same is hereby modified, the said Louis Raphael is hereby enjoined and restrained from further prosecuting his suit in the Superior Court of Suffolk County, Commonwealth of Massachusetts, being equity No. 37782, except that the said Louis Raphael may proceed in said cause to judgment, but no further.

It is further ordered that the said Louis F. Buff, Harold A. Dempsey and Clifford S. Drake pay to Louis Raphael the sum of $390.60 interest and his costs amounting to $171.10.

By the Court.

John E. Gilman, Jr., Deputy Clerk

December 7, 1931.

J. A. L., D. J.

From the foregoing order Louis Raphael claims an appeal to the United States Circuit Court of Appeals for the First Circuit and gives good and sufficient security that he will prosecute his plea to effect, and said appeal is allowed accordingly.

IN UNITED STATES DISTRICT COURT

PETITION OF LOUIS RAPHAEL FOR APPEAL—Filed December 28, 1931

To the Honorable James A. Lowell, Judge of the United States District Court for the District of Massachusetts:

The petition of Louis Raphael of New Britain, in the County of Hartford, in the State of Connecticut, respectfully shows that on November 27, 1931, George B. Monroe filed in the above-entitled cause a paper entitled "Motion to amend order allowing Louis Raphael to bring suit in the Superior Court for the County of Suffolk against Louis F. Buff, Clifford S. Drake and Harold A. Dempsey"; that an order of notice was issued thereon by this court directed to said Louis Raphael, returnable on December 3, 1931; that upon the return date of said order of notice, said Raphael appeared specially by counsel and duly filed in

[fol. 65] this court a plea to said "motion"; that thereafter, upon reading said motion and plea and hearing arguments of counsel thereon, the court did, on December 7, 1931, enter an order on said motion.

That your petitioner, feeling aggrieved by said order does hereby appeal therefrom to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors filed herewith and respectfully prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

Duly sworn to by Mark M. Horblit. Jurat omitted in printing.

December 28, 1931.—Appeal allowed.

J. A. L., D. J.

In United States District Court

Assignment of Errors—Filed December 28, 1931

Now comes Louis Raphael, the appellant named in the foregoing petition for appeal, and respectfully assigns the following errors as grounds for his appeal from the order dated December 7, 1931:

1. That the court erred in assuming jurisdiction over the appellant.

2. That the appellant being a resident of another State and being a litigant in another court, the District Court had [fol. 66] no jurisdiction to enjoin the appellant with respect to the proceedings in such other court.

3. That there was no such services of process upon the appellant as to warrant the issuance of the injunction against him.

4. That the motion on which the order was issued was not a sufficient or proper proceeding to warrant the issuance of said order.

5. That George B. Monroe, as receiver, had no legal or equitable interest in the State court proceedings referred to in said order and no standing to entitle him to an injunction against the appellant.

6. That there was error in failing to apply the equitable principles of laches and estoppel against the application made by the receiver in said motion.

7. That it was inequitable to enjoin the appellant from proceeding with the State court proceedings referred to in the order.

8. That the order was not warranted in the absence of evidence to support the application therefor.

9. That the order interferes with the lawful prosecution by the appellant of the State court proceedings and thus deprives him of valuable rights.

10. That it was inequitable to modify the order of March 23, 1931, after the appellant had in good faith instituted and prosecuted the State court proceedings under the authority thereof.

11. That said order is erroneous in that it interferes with the appellant's legal and constitutional right to prosecute the State court proceedings therein referred to.

12. That said order was not warranted by the record and was contrary to law.

(Seal United States Circuit Court of Appeals, First Circuit.)

Louis Raphael, by His Attorneys, Mark M. Horblit, Benjamin Goldman.

[fol. 67] Bond on appeal for $250.00, approved and filed December 28, 1931, omitted in printing.

[fol. 68] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 6, 1932

To the Clerk of the United States District Court for the District of Massachusetts:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the First Circuit pursuant to an appeal allowed in the above-entitled proceeding and to include in such transcript the following:

1. Agreed statement to be printed as part of record on appeal.
2. Affidavits filed by Clifford S. Drake and Louis F. Buff in qualifying as sureties on bond of Harold A. Dempsey.
3. Petition by Louis Raphael for leave to bring proceedings on said bond, filed March 23, 1931.
4. Order on said petition of Louis Raphael.
5. Ancillary bill of complaint filed April 16, 1931.
5a. Interlocutory decree dated May 4, 1931.
6. Decree on ancillary bill of complaint filed July 16, 1931.
7. Petition for contempt filed by receiver on October 7, 1931.
8. Order on petition for contempt dated October 21, 1931.
9. Motion of George B. Monroe, receiver, filed on November 27, 1931, to amend said order of March 23, 1931.
10. Restraining order and order of notice dated November 30, 1931, and return of service thereon.
11. Plea of Louis Raphael filed December 3, 1931.
12. Stenographic transcript of hearing on said motion and plea hereto annexed.
13. Order on said motion of George B. Monroe entered December 7, 1931.

[fol. 69] 14. Petition for appeal by Louis Raphael from said order of December 7, 1931.

15. Assignment of errors.
16. Bond on appeal.
17. Citation on appeal.

18. Præcipe.
Mark M. Horblit, Benjamin Goldman, Attorneys for Louis Raphael.

Approved.
A. J. Aldridge, Attorney for George B. Monroe, Receiver.

Citation, in usual form, showing service on Andrew J. Aldridge, omitted in printing.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.—Orders of enlargement of time for docketing case to and including March 3, 1932, are here omitted.—A. I. Charron, Clerk.]

[fol. 71] In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2675

Louis Raphael, Appellant,

v.

George B. Monroe, Receiver, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—June 27, 1932

Bingham, J.:

This is an appeal from an order entered December 7, 1931, in the District Court for Massachusetts in connection with receivership proceedings brought against The Mon-

roe Stores, Inc., enjoining the appellant, Louis Raphael, from further prosecuting a certain suit in the Superior Court of Suffolk County, Massachusetts, except that he might proceed in said cause to judgment, but no further.

The receivership bill was brought against The Monroe Stores, Inc. (hereafter called The Stores), on July 14, 1930, by J. B. Hirshfield & Co., Inc., and other creditors, and later, on July 23, 1930, George B. Monroe of Quincy, Mass., who was the treasurer of The Stores, was appointed receiver. In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proof to the receiver for allowance on or be- [fol. 72] fore September 30, 1930, Louis Raphael, a citizen and resident of Connecticut, presented his proof of claim on September 25, 1930, and on or about February 9, 1931, it was duly proved and allowed in the sum of $35,000.

Shortly prior to November 26, 1930, one Harold F. Dempsey made an offer to purchase from the receiver all the assets of The Stores, and by the terms of the offer as interpreted and agreed to by the parties he was to pay to its creditors 30 per cent of their claims within thirty days after they had been duly proved and allowed; also to pay within thirty days after allowance the liabilities of the receiver and his expenses. With this offer a bond was filed running to the United States of America and signed by Harold A. Dempsey, as principal, and Louis F. Buff and Clifford S. Drake, as sureties. This bond was in the penal sum of $100,000 and conditioned on compliance "with all the conditions and items of said offer." The bond was duly approved, the offer accepted and, on November 27, 1930, the assets of The Stores were turned over to Dempsey by the receiver.

The amount to be paid Raphael under this offer was $10,500. On March 23, 1931, more than thirty days after his claim against The Stores had been proved and allowed and after having been paid $1,200 thereon by Dempsey, Raphael "as creditor of said Monroe Stores, Inc.," filed a petition for leave to institute proceedings on the bond and, on the same day, leave was granted by the court.

April 9, 1931, Raphael brought suit on the bond in the Superior Court of Massachusetts in which he "obtained

and now has attachments upon the property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him." In hearings in the state court before a master, to whom the case was referred, both the receiver and his counsel testified. This case was prosecuted by Raphael to a point where, on November 13, 1931, it was ripe for the entering of a final decree against the signers of the bond and in favor of Raphael.

In the meantime, on April 16, 1931, the receiver filed in the receivership proceedings an ancillary bill of complaint [fol. 73] against Dempsey, Buff and Drake, as obligors on the bond, and on May 4, 1931, an interlocutory injunction issued enjoining them from transferring or encumbering their property "until the further order of this court." On July 16, 1931, after notice and hearing, and all parties to the bill consenting, a decree was entered in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants" Drake, Buff and Dempsey, jointly and severally, and that execution issue forthwith. In this sum of $33,026.33 the claim of Raphael was included, but he was not a party to and did not participate in the proceedings and did not authorize the receiver to act for him therein.

The receiver obtained nothing on the execution and, on October 7, 1931, filed in the District Court a petition for contempt as to defendants Buff and Drake on various grounds. The hearing on this petition resulted in an order directing Buff and Drake to pay the receiver $1,000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment was satisfied, the final disposition of the matter being held pending further orders of the court.

On November 27, 1931, the receiver, appellee here, filed in the original receivership proceedings a motion seeking to have the order of March 23, 1931, granting Raphael leave to bring suit on the bond, modified and that Raphael be enjoined from further prosecuting his cause of action in the Massachusetts court "except insofar as to reduce his claim to judgment." A preliminary injunction against Raphael and an order of notice to show cause was issued, which was served on Raphael's attorney. On December 3,

1931, Raphael appearing specially filed a plea in which he set out the facts in connection with his suit in the state court in detail, asserting that the receiver had no legal interest or standing to entitle him to an order interfering with the state court proceeding; that he was not a party to the proceeding either individually or as receiver; that he had no interest in his, Raphael's, claim; that the receiver in no way represented Raphael and had at no time been authorized to bring proceedings in his behalf; that at the [fol. 74] time of filing the ancillary bill of complaint in the receivership proceedings, the proceeding in the state court had already been commenced and was pending; that Raphael was not made a party to the ancillary bill of complaint and had never taken any part in the hearings thereon or in the contempt proceedings; that he was a resident of Connecticut and no personal service had been made upon him; that having knowledge of the order granting Raphael leave to bring suit against Dempsey, Drake and Buff on the bond and of the subsequent proceedings thereunder the receiver is barred and estopped from attempting to obtain a modification of said order; that he, Raphael, was not interfering or attempting to interfere in any way with the receivership; that said receiver had disposed of all the property of The Stores which came into his hands; and that Drake and Buff were amply able to pay his, Raphael's, claim and such payment would not interfere with the collection by any of said other creditors of the amounts due them. Raphael filed with his plea the report of the master in the state court proceeding.

After a hearing on the receiver's motion to modify and the plea of Raphael, an order was entered by the court modifying said order and restraining the appellant from further prosecuting the suit in the state court except that he might proceed in that cause to judgment but no further. This is the order here appealed from.

The assignments of error are twelve in number but the appellant in his brief has reduced them to six questions:

1. Whether the appellee had any legal standing or interest to entitle him to the order, he having no interest in the state suit.

2. Whether the court had jurisdiction over the appellant, he being a citizen and resident of Connecticut and not having been personally served with the order of notice.

3. Whether the District Court erred in enjoining the appellant from prosecuting his action in the state court, the injunction interfering with appellant's legal right to sue in the state court.

4. Whether equitable principles of laches and estoppel should have been applied.

[fol. 75] **5. Whether the order was warranted on general principles of equity.**

6. Whether the order could lawfully be entered on the "motion".

It is unnecessary to consider the first question as the appellee does not base his right to the injunction on any interest he may have in the suit in the state court but on the ground that the District Court has exclusive jurisdiction of actions on the bond given in the receivership proceedings, the bond, as alleged by him, taking the place of the receivership assets.

The fundamental inquiry is whether the District Court had, by reason of the receivership proceedings, such jurisdiction of the subject matter of the suit in the state court as to authorize it to issue an injunction restraining its further prosecution.

It is well settled that a federal court has no power to enjoin a suit in a state court unless the res in its custody is affected or interfered with (Guardian Trust Co. v. Kansas City Ry. Co., 146 Fed. 337, 340; id. 171 Fed. 43; Kline v. Burke Construction Co., 260 U. S. 226) or its jurisdiction is in some other way defeated or impaired. Hull v. Burr, 234 U. S. 712, 723; Julian v. Central Trust Co., 193 U. S. 93.

The receiver does not question this proposition but contends that in this case the bond in the res in the receivership proceedings; that it stands for and is held by him as a substitute for the assets of The Stores (Dietzsch v. Huidekoper, 103 U. S. 494); and that a suit by a creditor on the bond in another court would defeat and impair the jurisdiction of the federal court previously acquired.

We think this contention as applied to the admitted facts of this case is not sound. It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price (the 30 per cent of the claims of the creditors). In that case the receiver would have been entitled to receive the

money from Dempsey or sue on the board with the duty of paying out as assets of the estate such funds as he might receive and the District Court would have had exclusive [fol. 76] jurisdiction to direct such proceedings. But that is not the situation here. The assets of The Stores were delivered to Dempsey on his promise to pay the creditors 30 per cent of their claims, and the liabilities and expenses of the receiver. To protect the creditors a bond was required and given running to the United States of America conditioned on the fulfilment of Dempsey's promise to pay the creditors. Whether this bond was held by the receiver or the clerk of court does not appear, but, in either event, the holder was simply acting as a depository, the parties interested in the bond being the creditors, and the receiver only to the extent of the claims against him as receiver and his expenses. All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser rather than to the receiver for the payment of the dividends on their claims, all that remained for that court to do was to allow the claims of the creditors and settle the account of the receiver. There was no res in the custody of the District Court and there were no matters left over requiring judicial action of that court in relation to the receivership property or to any rights litigated in the receivership proceedings making necessary any further orders or decrees to establish the rights of the parties therein, which were or could be interfered with by the suit in the state court. The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one in personam against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores.

Under these circumstances, even if Raphael's suit had been brought against Dempsey, the purchaser, and any assets of The Stores which he had purchased and which might have been in his possession had been attached to satisfy any judgment obtained therein, the jurisdiction of the District Court would not have been defeated or impaired for it had parted with all interest in and control over those assets. A fortiori this is so where the property attached or sequestered in a suit is property in which the receivership estate never had an interest and the suit is on

[fol. 77] a bond in which the receiver, except as pointed out above, never had an interest.

No leave of court to sue the obligors on the bond was necessary. But if it was, the suit was not to assert a claim against assets in the custody of the District Court, but was one in personam against the principal and the sureties on the bond.

Again, whatever the order granting leave to sue amounted to, it was a final decree (Odell v. Batterman, 223 Fed. 292), was granted on March 23, 1931, and could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired, and the court had lost control of the matter.

Then again, after Raphael had been granted leave to sue and had commenced proceedings in personam in the state court, that court obtained jurisdiction and "the rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached the right cannot be restrained by proceedings in any other court, applies to protect the jurisdiction of the State court unless the case is within some recognized exception to § 265 of the Judicial Code." Riehle v. Margolies, 279 U. S. 218, 223. Here, as in that case, "there is no basis for any such exception."

Furthermore, the state court, having rightfully taken jurisdiction of Raphael's bill against Dempsey and his sureties on the bond, had by means of attachments of tangible property of the defendants Drake and Buff and orders restraining them from transferring or encumbering their other property, the judicial custody of such property, and valid legal and equitable liens thereon were created in favor of the plaintiff. Snyder v. Smith, 185 Mass. 58; Rioux v. Cronin, 222 Mass. 131; Metcalf v. Barker, 187 U. S. 165; Pickens v. Roy, 187 U. S. 177. And assuming that the ancillary bill brought by the receiver in the receivership proceedings was in the nature of a creditor's bill brought for his benefit and all others similarly situated, the injunction issued by the District Court on the filing thereof could not avail to give that court jurisdiction over property already rightfully in the custody of the state court. Covell v. Heyman, 111 U. S. 176; Picknes v. Roy, 187 U. S. 177; Kline v. Burke Construction Co., [fol. 78] 260 U. S. 226. In any event if, by the preliminary injunction, any right or power could, under the circum-

stances disclosed, have been obtained over the property of Dempsey, Buff and Drake, it was lost when the injunction was dissolved by the final decree in the District Court, not having continued the injunction. Sweeney v. Hanley, 126 Fed. 97; Gardner v. Gardner, 87 N. Y. 14.

In the plea of Raphael it is alleged that "Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors * * * whose claims have been proved and allowed"; and that Drake and Buff are "amply able forthwith to pay said obligation to said Raphael * * * and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them." In the preparation of the record on this appeal it was agreed by the parties that "the statements set forth in the plea of Louis Raphael * * * with respect to said proceedings in the Suffolk Superior Court * * * and with respect to the proceedings in said United States District Court * * * are true." It is evident, therefore, that no question of preference by Raphael over the other creditors is involved.

The suggestion that the order of the District Court allowing Raphael to bring suit on the bond in the state court was a nullity is based on the idea that the jurisdiction of the District Court over that suit was exclusive, and that it was exclusive because the United States had an interest in the bond and therefore was a real party plaintiff within the meaning of Section 24 of the Judicial Code. The United States was a nominal party only; it had no interest in the bond or the suit upon it. The relator, Raphael, was the real plaintiff. Howard v. United States, 184 U. S. 676, 680.

Then again, if the United States had been a real party plaintiff within the meaning of the first paragraph of Section 24, the District Court then would not have had exclusive jurisdiction, for Section 24 only confers original jurisdiction. Section 256 of the Judical Code defines the "cases and proceedings" over which the courts of the United States have exclusive jurisdiction. It does not include [fol. 79] suits where the United States is a party plaintiff as defined in the first paragraph of Section 24.

The bond was not a federal statutory bond, and it was optional with Raphael to bring suit upon it either in the

federal or state courts, there being diversity of citizenship and the requisite amount involved. The decision in U. S. F. & G. Co. v. Kenyon, 204 U. S. 349, is without application in this case. There the bond sued was a federal statutory bond (raised a federal question), but the amount involved was less than $2,000, the then requisite amount. The jurisdiction of the federal court was there upheld under the first clause of Section 24, for the United States had an interest in the bond and was a real party plaintiff.

Taking the view we do as to the questions here discussed, it is unnecessary to deal with the other points raised by the appellant.

The order or decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant.

DISSENTING OPINION

MORTON, J. (dissenting):

The essential facts are simple. In an equity receivership pending in the District Court, the receiver was authorized to sell the property in his custody for payment of the expenses of the receivership and thirty per cent of all claims which might be filed by a certain date and allowed by the court. To secure payment according to the agreement, the buyer, Dempsey, gave a bond with sureties in the sum of $100,000.00 running to the United States. Raphael was one of the creditors. He appeared in the receivership proceedings and proved his claim; and it was allowed for $35,000.00. Dempsey defaulted on his payments. Raphael obtained leave of the District Court to sue Dempsey and his sureties on the bond in the State Court. Suit was accordingly brought there by Raphael in the name of the United States of America, on his relation, as plaintiff, and was prosecuted nearly to final judgment. The property of the defendants was attached in that suit and is still held under the attachment. After Raphael's suit had been begun the receiver brought suit on the bond by [fol. 80] a supplementary bill in the District Court, in the name of the United States, and a final judgment was entered therein against Dempsey and his sureties for $33,026.00, which includes the amount due to all creditors including Raphael.

After obtaining this judgment the receiver moved in the District Court that the leave theretofore granted to Raphael to sue in the State Court be revoked and further proceedings therein by him be enjoined, except the entry of judgment. From the allowance of this motion and the granting of the injunction, the present appeal was taken.

The suit on the bond is clearly within the general jurisdiction of the federal courts. The Judicial Code provides, "The District Court shall have original jurisdiction as follows: First: Of all suits of a civil nature, at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue," etc. (sec. 24). It is well settled that on bonds taken in the name of the United States there is jurisdiction under this statute. (Howard v. United States, 184 U. S. 676; U. S. F. & G. Co. v. Kenyon, 204 U. S. 349.) The contrary view was followed in United States v. Sheridan, 119 Fed. 236; United States v. Barrett, 135 Fed. 189, which were overruled by the Kenyon decision.

The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view leads to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain a preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs, while my brethren apparently think him entitled to his preference.

[fol. 81] I also differ from my brethren in their construction of the bond, as being suable by individual creditors for their own benefit. It is conditioned only that Dempsey

shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made. The present bond differs from those given to protect material men, in that a receiver is here interposed between the creditors and the obligors. Even as to bonds of this general character, expressly conditioned on the payment of specified claims, I am aware of no case in which they have been held to create such individual rights of action as are here approved. When one creditor sues on them it must be on behalf of all. Under the majority decision, Dempsey's default in payment under his contract set up a free-for-all on the bond, open to all creditors with allowed claims,—for it is not to be supposed that the court would grant leave to sue to one and refuse it to another,—in which the prize, the assets of the obligors, goes to the quickest and smartest. It seems to me an unfortunate, as well as an erroneous, result.

Notwithstanding the dictum in the Howard case, supra, there is, I think, grave doubt whether the State Court had any jurisdiction of the suit on the bond in the name of the United States. The words "Of all suits", in sec. 24, have usually been understood as conferring exclusive jurisdiction. In the entire history the Massachusetts Supreme Judicial Court (according to the table of cases in the digest) only one action, not resting on some special statute, has ever been brought in the name of the United States. 254 Mass. 173,—a claim on a check taken by the United States which was drawn on a State trust company which failed and was being liquidated under direction of the State Court. The Dempsey bond and all proceedinggs on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill-advised. The District Judge was right in recognizing that fact and revoking the order.

[fol. 82] On April 13, 1932, this case came on to be heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-seventh day of June, A. D. 1932, the Opinion of the Court (page 71) and a dissenting opinion (page 79) were filed and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—June 27, 1932

This cause came on to be heard April 13, 1932, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was submitted on briefs by leave of court.

Upon consideration whereof, It is now, to wit, June 27, 1932, here ordered, adjudged and decreed as follows: The order or decree of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, with costs to the appellant.

By the Court.

Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,104. U. S. Circuit Court of Apppeals, First Circuit. Term No. 407. George B. Monroe, receiver, petitioner, vs. Louis Raphael. Petition for a writ of certiorari and exhibit thereto. Filed September 27, 1932. File No. 37,104.

Office Supreme Court, U.S.
FILED
SEP 27 1932
CHARLES ELMORE CROPLEY
Clerk

FILE COPY

Supreme Court of the United States.

October Term, 1932.

No. 407

GEORGE B. MUNROE, Receiver,
Petitioner,

v.

LOUIS RAPHAEL,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition	1
Reasons for the writ	2
Brief	5
Statement of jurisdiction	5
Statement of facts	5
Argument	10
I. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court	10
II. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court	11
III. The Circuit Court of Appeals has made a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter	15
IV. The considerations at stake in the judgment of the Circuit Court of Appeals, and the results thereof, are of so grave and serious a nature as to warrant review by this Court	17

TABLE OF CASES CITED.

Buckhannon & N.R. Co. v. Davis, 135 Fed. 707	16
Dietzsch v. Huidekoper, 103 U.S. 494	14
Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337; id. 171 Fed. 43	10
Howard v. United States, 184 U.S. 676	13
Hull v. Burr, 234 U.S. 712	11
Investment Registry, Ltd., v. Chicago & M. Electric Ry., 251 Fed. 510	16
Illinois Surety Co. v. United States, 226 Fed. 665	14, 19
Julian v. Central Trust Co., 193 U.S. 93	11
Kline et al. v. Burke Construction Co., 260 U.S. 226	11

	Page
Odell v. Batterman, 223 Fed. 292	15
New York Security & Trust Co. et al. v. Illinois Transfer R. Co., 104 Fed. 710	15
Riehle v. Margolies, 279 U.S. 218	11
U.S. F. & G. Co. v. Kenyon, 204 U.S. 349	11, 12, 14

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

GEORGE B. MUNROE, RECEIVER,
Petitioner,
v.
LOUIS RAPHAEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George B. Munroe, as receiver of Munroe Stores, Inc., a Massachusetts corporation having an usual place of business in Massachusetts, by decree of the United States District Court for the District of Massachusetts entered on July 23, 1930, respectfully petitions this Court for a writ of certiorari to require that there be certified to this Court for review and determination the cause the record of which remains in the Circuit Court of Appeals for the First Circuit, wherein your petitioner was the appellee and Louis Raphael, a citizen and resident of Connecticut, was the appellant, and wherein on June 27, 1932, a judgment was entered against your petitioner, reversing an order of the United States District Court for the

District of Massachusetts entered on December 7, 1931, which modified a previous order of said District Court dated March 23, 1931, whereby said Louis Raphael was permitted to sue the principal and sureties on a bond given by the purchaser of the business and assets in the hands and possession of your petitioner as such receiver, and which order of December 7, 1931, enjoined and restrained said Louis Raphael from further prosecuting a suit which he had brought on said bond in the Superior Court of the Commonwealth of Massachusetts pursuant to said permission from the District Court.

Reasons for the Writ.

Your petitioner respectfully submits the following reasons for the allowance of his petition for a writ of certiorari in this action:

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has made a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

4. The considerations at stake in the judgment of the Circuit Court of Appeals and the results thereof are of so grave and serious a nature as to warrant review by this Court.

5. The decision of the majority of the Circuit Court of Appeals is in error in law and fact and is opposed by a dissenting opinion of Mr. Justice Morton.

Wherefore your petitioner prays that a writ of certiorari issue to the end that said cause may be reviewed and determined by this Court as provided by law, and that said

decision of the Circuit Court of Appeals for the First Circuit of June 27, 1932, be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

GEORGE B. MUNROE,
Receiver of Munroe Stores, Inc.,
By his Attorneys,
WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.

Supreme Court of the United States.

OCTOBER TERM, 1932.

GEORGE B. MUNROE, RECEIVER,
Petitioner,
v.
LOUIS RAPHAEL,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF JURISDICTION.

This application for a writ of certiorari is governed by the Act of February 13, 1925, chapter 229, section 1; 43 Stat. 938; Code of Laws of the United States, title 28, section 347; and by the Rules of this Court adopted June 5, 1928 (275 U.S. 622). It meets the requirements outlined in these rules.

STATEMENT OF FACTS.

On July 14, 1930, a bill in equity for the appointment of a receiver for Munroe Stores, Inc. (hereinafter called The Stores), a Massachusetts corporation having an usual place of business in Massachusetts, was brought in the United States District Court for the District of Massachusetts (R. 1 and 2, par. A).

On July 23, 1930, the District Court appointed George B. Munroe of Quincy, Massachusetts, your petitioner, as receiver, and on the same day he gave bond and duly qualified (R. 2 and 3, par. D).

In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proofs therefor to the receiver for allowance on or before September 30, 1930 (R. 10, par. 3), Louis Raphael, a citizen and resident of Connecticut and the respondent herein, presented his proof of claim on September 25, 1930, and on February 9, 1931, it was duly approved and allowed in the sum of $35,000 (R. 10, par. 4).

Shortly prior to November 26, 1930, one Harold F. Dempsey made an offer in writing to purchase from your petitioner, the receiver, all the assets of The Stores (R. 9, par. 1, and R. 12-15). By the terms of this offer Dempsey agreed to "pay thirty percent of the claims of all the creditors of The Munroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed" (R. 12, par. 1) and to present to the District Court within seven days from the acceptance of the offer "a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void" (R. 14, par. 7). Accompanying the offer was a bond signed by said Dempsey as principal and Louis F. Buff and Clifford S. Drake as sureties, by the terms of which they were "bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves," and on condition that Dempsey "shall comply with all the conditions and items of said offer" (R. 15 and 16).

On November 26, 1930, this written offer to Dempsey was duly accepted by your petitioner, the receiver, pursuant to an order of the District Court, and thereafter Dempsey filed said bond in the District Court (R. 10, par. 2). The bond

and the sureties thereon were duly approved by the District Court on December 2, 1930 (R. 10, par. 2), and the assets of The Stores were turned over to Dempsey by the receiver (R. 11, par. 6).

The amount to be paid Raphael, the respondent herein, under the terms of the offer, was $10,500 (R. 10, par. 4), but only $1200 was paid him on account of this sum (R. 11, par. 5). Accordingly, on March 23, 1931, more than thirty days after his claim against The Stores had been approved and allowed, Raphael filed a petition in the original receivership proceedings in the District Court, praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce" the obligation of Dempsey and his sureties on the bond (R. 9-11). On the same day the following order was entered by the District Court: "Petition allowed, leave to sue granted to petitioner, Louis Raphael" (R. 12).

Thereupon, on April 9, 1931, Raphael brought suit on said bond against Dempsey and his sureties in the Superior Court of the Commonwealth of Massachusetts (R. 3, par. 1, and R. 37, par. 4), and the case was referred to a master (R. 37, par. 5).

Dempsey was in default in paying the claims of the other creditors of The Stores as provided in the offer (R. 17, par. 4), and accordingly, on April 16, 1931, the receiver, your petitioner, filed an ancillary bill of complaint in the original receivership proceedings in the District Court, against said Dempsey and his sureties, Buff and Drake, as obligors on the bond (R. 16-20), and in this ancillary bill the receiver sought to force Dempsey and his sureties to pay over to the Clerk of the District Court, for the use and benefit of the receiver, the creditors of the receiver and the creditors of The Stores, the balance due on account of the purchase price of the assets of The Stores (R. 20, par. 2). This balance included the remainder of the dividend due Raphael, the respondent herein (R. 4, par. J). On July 16, 1931, after

notice in hearing, all parties to the bill consenting, a decree was entered by the District Court in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83 together with costs be entered against the defendants" Drake, Buff and Dempsey (R. 23). This sum of $33,026.83 included the amount due Raphael (R. 4, par. J).

Nothing was obtained on execution on this judgment, and on October 7, 1931, the receiver, your petitioner, filed in the original receivership proceedings in the District Court a petition for contempt as to the defendants Buff and Drake, sureties on the bond (R. 23-27). At the hearing on this petition the District Court ordered the sureties to pay the receiver $1000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment in the ancillary bill was satisfied, the final disposition of the matter being held pending further orders of the Court (R. 29). Pursuant to this order the sureties, Buff and Drake, are paying $1000 a month to the counsel for the receiver (R. 4, par. K).

In the meantime the suit on the bond by Raphael against Dempsey and his sureties in the Massachusetts Court was prosecuted to a point where the master's report was filed, and was confirmed by the Court on October 20, 1931 (R. 38, par. 6). Thereafter, on November 13, 1931, Raphael filed a motion in the State Court proceeding for the entry of a final decree, and presented a form of draft decree (R. 38, par. 7). The master found for Raphael in the amount of $9300 and interest (R. 31 and 32, par. 1), and the draft decree directs the sureties, Buff and Drake, to pay this amount, and on their failure to satisfy this indebtedness directs a special master to collect and sell certain of their properties and use the proceeds thereof to satisfy the amount of the decree (R. 32, pars. 4, 5 and 6).

On November 27, 1931, the receiver, your petitioner, filed a motion in the original receivership proceedings in the Dis-

trict Court, seeking to have modified the order of March 23, 1931, which granted Raphael, the respondent herein, leave to bring suit on the bond, and seeking to enjoin Raphael from further prosecuting his cause of action in the Massachusetts Court (R. 30-31). Raphael filed a plea to this motion of the receiver on December 3, 1931 (R. 36-41), and after a hearing the District Court entered an order on December 7, 1931, modifying its order of March 23, 1931, whereby Raphael was permitted to sue on the bond, and enjoining Raphael from further prosecuting his suit in the Massachusetts Court, except that he might proceed to judgment, but no further (R. 63-64). The District Court further ordered Dempsey and his sureties to pay Raphael the sum of $390.60 interest and his costs in the State Court proceeding, amounting to $171.10 (R. 64).

On December 28, 1931, Raphael filed an appeal from this order of the District Court entered on December 7, 1931 (R. 64), together with an appeal bond (R. 67), and an assignment of errors in support of his appeal (R. 65-66).

On June 27, 1932, the Circuit Court of Appeals for the First Circuit reversed this order of the District Court entered on December 7, 1931, and remanded the case to that Court (R. 82). Mr. Justice Morton dissented from the majority of the Court, however, saying: "The Dempsey bond and all proceedings on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill advised. The District Judge was right in recognizing that fact and revoking the order" (R. 81).

A certified copy of the entire record in this case, including the majority opinion of the Circuit Court of Appeals and the dissenting opinion of Mr. Justice Morton, is presented herewith.

Argument.

FIRST

The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

The questions which the Circuit Court decided were as follows:

1. Is the bond a *res* in the receivership proceeding, and in the possession and under the control of the District Court through the receiver, its officer?
2. Has the United States, through the receiver, its officer, the sole right to sue on the bond?
3. If the United States has a sole right to sue on a bond, and if the United States can give an individual creditor permission to sue on the bond, is the granting of such permission a final decree, or is it a discretionary, administrative order which can be modified at any time?

None of these questions have ever been decided by this Court, and there are no authorities directly in point on these issues. In each case cited by a majority of the Circuit Court the situation and the facts were distinguishable from those of the case at bar.

The case of *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337; id. 171 Fed. 43, comes the closest of any authority to the exact set of facts in the case before this Court. In that case, however, the purchaser of the assets of the business in receivership gave no bond running to the United States, and in fact gave no bond at all; there was merely the promise on the part of the purchaser to pay the creditors. It is therefore clearly distinguishable from the case at bar. Furthermore, the Guardian Trust cases were not decided by this Court. They were decisions of a Circuit Court of Appeals.

The facts in *Kline et al.* v. *Burke Construction Co.,* 260 U.S. 226; *Hull* v. *Burr,* 234 U.S. 712; *Julian* v. *Central Trust Co.,* 193 U.S. 93; and *Richle* v. *Margolies,* 279 U.S. 218, are not as nearly in point with the present case as are those of the Guardian Trust Co. cases. They are cited by the majority of the Circuit Court as setting forth the principle that the Federal Court cannot enjoin a proceeding in a State Court unless a *res* in the custody of the Federal Court is affected or interfered with. Your petitioner submits that this principle does not apply to the facts of the case at bar, which are entirely different from those of the authorities above cited.

The issues decided by the Circuit Court strike a vital cord in receivership proceedings in the Federal Court and in the proper, equitable and orderly administration of such receiverships.

SECOND

THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Your petitioner has previously stated that there are no cases directly in point with the situation and facts of the case at bar. Nevertheless, there may be one or two cases of persuasive authority bearing on one or more questions arising in the present case. One such case is *U.S. F. & G. Co.* v. *Kenyon,* 204 U.S. 349.

In that case one entering into a contract with the United States Government for the construction of a public building filed a bond pursuant to a Federal statute which provided that any one contracting with the United States for construction of a public building was required to execute a bond with sufficient sureties conditioned that the contractor pay all materialmen and laborers and providing that materialmen and laborers who were not paid by the contractor

could bring suit on the bond in the name of the United States for their own benefit.

A materialman of the contractor in this case brought suit on the bond in the name of the United States in a Federal Court, against the contractor. The question before the Court was whether the Federal Court had jurisdiction over the action in view of the fact the value of the matter in dispute was less than $2000.

The Court held that the Federal Court had jurisdiction of the suit on the ground the United States was a real party in interest under the statute, and not merely a formal party to the bond. At pages 356 and 357 the Court said:

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection. It may well have thought that the government was under some obligation to guard the interests of those whose labor and materials would go into a public building. . . . The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was

> therefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for the labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect of that matter."

To be sure, the bond in the above-cited case was given under a statute, and the majority of the Circuit Court in this case have tried to distinguish it on this ground (R. 79). Your petitioner, however, maintains that the case is persuasive authority in support of the proposition that the United States, through the receiver, its officer, is the real party in interest in the bond given by the purchaser of the assets in receivership. The United States is as interested in the bond in this case as it was in the case above cited, and the reasoning of the Court in the quotation above cited is equally applicable to the case at bar.

Mr. Justice Morton in his dissenting opinion supports the contention that the bond is not suable by individual creditors, but rather by the receiver as an officer of the United States. At page 81 of the record he says:

> "I also differ from my brethren in their construction of the bond, as being suable by individual creditors for their own benefit. It is conditioned only that Dempsey shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made."

In the case of *Howard* v. *United States*, 184 U.S. 676, cited as controlling by the majority of the Circuit Court, this Court said that the United States was a merely nominal party to an official bond of a Clerk of Court. This is mere

dictum, and does not control the construction of the bond in the case at bar. The United States, through the District Court and its receiver, has undertaken the administration of the affairs of the business in receivership in this case. It has an interest in the orderly and equitable administration of these affairs, and in the payment of the creditors and the fulfillment of the conditions of the bond. The United States has no such interest and duty in an official bond, and therefore the dictum in the Howard case does not control the case at bar. See *Illinois Surety Company* v. *United States*, 226 Fed. 665.

The decision of the majority of the Circuit Court is therefore probably in conflict with the decision of this Court in *U.S. F. & G. Co.* v. *Kenyon*, 204 U.S. 349.

There is also one other persuasive authority of this Court with which opinion the majority of the Circuit Court is probably in conflict. That case is *Dietzsch* v. *Huidekoper et al.*, 103 U.S. 494. At page 497 this Court said:

> "The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. . . . The bill in this case was, therefore, ancillary to the replevin suit."

To be sure, this quotation is merely dictum, but the majority of the Circuit Court refused to apply it to the case at bar (R. 75):

> "We think this contention as applied to the admitted facts of this case is not sound. It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price . . ."

The majority of the Court was in error. Dempsey did promise to pay the receiver the purchase price; he promised to pay the United States.

The purchaser took title and possession of the business and assets from the receiver, the officer of the United States, who represented all the creditors. In return for the assets and business, the purchaser gave a bond as security for his payment therefor. Certainly it could not be said that this security was given to all the creditors individually. On the contrary, it was given to the receiver, the party from whom the assets were purchased. Any other construction of the bond and of the facts would flaunt the common sense of the situation and the intention of the District Court and the parties.

THIRD

THE CIRCUIT COURT OF APPEALS HAS MADE A DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS ON THE SAME MATTER.

The majority in the Circuit Court argue that the order of the District Court on March 23, 1931, giving Raphael leave to sue on the bond was a final decree if it amounted to anything, and that it could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired, the District Court having lost control of the matter (R. 77). In support of this proposition the Court cited *Odell* v. *Batterman*, 223 Fed. 292, a case decided by the Circuit Court for the Second Circuit.

Your petitioner maintains that the above reasoning and decision of the majority of the Circuit Court in this case is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *N.Y. Security & Trust Co. et al.* v. *Illinois Transfer R. Co.*, 104 Fed. 710. In that case the Court held that an order of a Federal Court granting leave to sue a Federal Court receiver in a State Court was not a final decree and was not appealable. The Court said, at page 710:

> "This appeal is from an order granting leave to sue in a state court a receiver appointed by the United

States circuit court. The order was made after the suit was brought and entered nunc pro tunc as of a date prior to the bringing of the suit. Whether for that reason it was invalid we do not consider. Such an order is discretionary and administrative, and therefore, in the opinion of the Court, is not appealable. The motion to dismiss the appeal is therefore sustained."

See *Investment Registry, Ltd.*, v. *Chicago & M. Electric Ry.*, 251 Fed. 510, where the Circuit Court of Appeals for the Seventh Circuit said, at pages 512 and 513:

"The prime end to be served is the due and proper conservation of the property in the hands of the Court, in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the Court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal Court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the Court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave.

"Under such circumstances, there is involved no question of comity between different courts, but only that of the best interest of the estate which the Court is administering. . . . The order granting leave is not final in the sense that thereby a definite status is fixed."

See also *Buckhannon & N.R. Co.* v. *Davis*, 135 Fed. 707, where the Circuit Court for the Fourth Circuit said, at page 709:

> "It is contended by appellant that the Court did not have power to revoke, annul or modify this order of October 27, 1903, which granted permission to sue the receiver, and reserved the question as to the forum in which suit should be brought. The Court undoubtedly had the right to attach any reasonable condition to the order which granted permission to sue the receiver, and, if necessary, to modify or revoke any order which it might have improvidently granted."

The decision of the majority of the Circuit Court in this case was wrong. The granting to Raphael of permission to sue on the bond did not amount to a final decree. If the District Court could give a creditor permission to sue on the bond, such permission did not amount to a final decree, and the District Court could modify or recall its permission at a later date.

FOURTH

THE CONSIDERATIONS AT STAKE IN THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS, AND THE RESULTS THEREOF, ARE OF SO GRAVE AND SERIOUS A NATURE AS TO WARRANT REVIEW BY THIS COURT.

As a result of the decision of the majority of the Circuit Court, the proper equitable and orderly administration of the receivership by the District Court will be hampered and is imperilled. Unless the execution in the Massachusetts State Court proceeding is restrained, Raphael may obtain a preference to the prejudice of the other creditors of The Stores. The assets of Dempsey and the sureties on his bond, Buff and Drake, are entirely unlisted stocks in relatively small local concerns, and certain real-estate interests. It is a matter of common knowledge today that assets of these sorts are of little and questionable cash value.

At the hearing on your petitioner's motion to modify the previous order giving Raphael leave to sue on the bond,

counsel for your petitioner spoke to the Court as follows (R. 55 and 56):

> "Now, Mr. Horblit (counsel for Raphael) is entitled to his money without question, but the other creditors are also entitled to their money.
>
> "The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case."

Mr. Justice Morton in his dissenting opinion lays emphasis on the gravity of the situation resulting from the decision of the majority of the Circuit Court (R. 80):

> "The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view led to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain a preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs,

while my brethren apparently think him entitled to his preference."

See the language of Mr. Justice Mack, speaking for the Circuit Court for the Seventh Circuit in *Ill. Surety Co.* v. *United States*, 226 Fed. 665, at 668:

> "The object of the bond is to afford protection to all beneficiaries alike. The support of the whole Bankruptcy Act would be violated if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of later litigants. Only in a proceeding in which all parties will have an opportunity to be heard, and resulting in a judgment or decree that will be res judicata as to the surety as well as to all depositors, can justice be done."

The majority of the Circuit Court are in error when they said (R. 78) that it was evident there was no question of preference by Raphael over the other creditors, because Raphael had alleged in his plea that Drake and Buff possessed property of a value far in excess of the amount of their obligation to all the creditors of The Stores, and because in the preparation of the record on the appeal in this case it was agreed by the parties that "The statements set forth in the plea of Louis Raphael . . . with respect to said proceedings in the Suffolk Superior Court . . . and with respect to the proceeding in said United States District Court . . . are true" (R. 4). Your petitioner points out that it was *agreed* that the *statements with regard to said proceedings in the State and Federal Courts* were *true*.

There was *no agreement*, however, as to the *truth of the allegations in Raphael's plea* or the facts set forth therein, *other than* the *fact that certain pleadings were filed* and the *fact that the Court took certain action* thereon.

It is not true that there is no question of preference by Raphael over the other creditors.

Respectfully submitted,

WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.,
Attorneys for Petitioner.

Office Supreme Court, U. S.
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Supreme Court of the United States.

October Term, 1932.

No. 407.

George B. Monroe, Receiver,
Petitioner,

v.

Louis Raphael,
Respondent.

BRIEF FOR PETITIONER.

WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

SUBJECT INDEX.

	Page
Statement of facts	1
Outline of argument	7
Argument	8
I. Introductory consideration	8
II. The United States, through the receiver, its officer, is the real obligee of the bond and has the sole right to sue thereon. If an individual creditor can bring suit on the bond, it is only with the permission of the District Court	12
III. At any time in its sole discretion, on motion of the receiver, your petitioner, the District Court could modify or withdraw its previous order granting the respondent, Raphael, leave to sue on the bond	20
IV. The order of the District Court on December 7, 1931, modifying and withdrawing its previous order granting the respondent, Raphael, leave to sue on the bond and restraining the action which the respondent had brought in the Massachusetts Court pursuant to said leave, is not an abuse of the Court's discretion	25
V. The order of the District Court on December 7, 1931, does not violate the provisions of section 265 of the Judicial Code, which prohibits a Federal Court from staying proceedings in a State Court	28
VI. The order of the District Court on December 7, 1931, does not violate the equitable principles of laches and estoppel.	34
VII. The District Court did not err in assuming jurisdiction over the respondent, Raphael, on the receiver's motion to amend	36
VIII. Conclusion	42

TABLE OF CASES.

	Page
Abraham v. North German Fire Ins. Co., 37 Fed. 731	40, 41
Alexander v. Union Surety & Guaranty Co., 85 N.Y. S. 282	14
B. & A. R.R. Co. v. Reardon, 226 Mass. 286	35
Barceloux v. Buffum, 51 Fed. (2d) 82	21
Bartlett v. Sultan of Turkey, 19 Fed. 346	40
Blaffer v. New Orleans Water Supply Co., 160 Fed. 389	21
Bolser v. United States, 26 Fed. (2d) 4	19
Buckhannon & N.R. Co. v. Davis, 135 Fed. 707	23, 31
Calkins v. Wire Hardware Co., 267 Mass. 52	34
Campbell v. Golden Cycle Mining Co., 141 Fed. 610	39
Carter v. Sullivan, 1932 Mass. Adv. Sheets, 2113	34
Central Trust Co. of N.Y. v. McGeorge, 151 U.S. 129	36
Christensen v. Christensen, 14 Fed. (2d) 475	38
City of New York v. Consolidated Gas Co. of N.Y., 253 U.S. 219	20
City of New York v. N.Y. Tel. Co., 261 U.S. 312	21
Cohen v. Bailly, 266 Mass. 39	34
Cortes Co., The, v. Thannhauser, 9 Fed. 226	41
Covell v. Heyman, 111 U.S. 176	29
Crawford v. Foster, 84 Fed. 939	37, 38
Credits Commutation Co. v. United States, 177 U.S. 311	20, 21
Crelin v. Ely, 13 Fed. 420	40
Currier v. Beard, 216 Mass. 113	38
Cutting, Ex parte, 94 U.S. 14	20
Dickey v. Turner, 49 Fed. (2d) 998	39, 40
Dietzsch v. Huidekoper, 103 U.S. 494	30, 31
Dodd & Co. v. Tarr, 251 Mass. 189	35
Dunn v. Clarke, 8 Pet. 1	40
Eichel v. U.S. Fidelity &c. Co., 245 U.S. 102	39
Farmers' Bank v. Halsey Stuart & Co., 21 Fed. (2d) 818	34

Page

Fidelity & Deposit Co. of Maryland v. Farmers' Bank, 44 Fed. (2d) 11 34
Fidelity & Deposit Co. of Maryland v. United States, 35 Fed. (2d) 940 19
Fidelity Insurance T. & S.D. Co. v. Norfolk & W. R. Co., 88 Fed. 815 33
Field v. Kansas City Refining Co. et al., 296 Fed. 800 22, 27, 32
Fisher v. Clark, 22 Fed. (2d) 295 35
Finance Corp. of New England v. Parker, 251 Mass. 372 37
Fitzgerald &c. Co. v. Fitzgerald, 137 U.S. 98 36
Freeman v. Howe, 24 How. 450 39
Galliher v. Cadwell, 145 U.S. 368 34
Haynes, S. O., & Co. v. Druggists' Circular, 32 Fed. (2d) 215 34
Hill v. Burr, 234 U.S. 712 30
Howard v. United States, 184 U.S. 676 14
Illinois Surety Co. v. United States, 226 Fed. 665 18
Illinois Surety Co. v. United States to the Use of Peeler, 240 U.S. 214 19
Interior &c. Co. v. Gibney, 160 U.S. 217 36
Investment Registry, Ltd., v. Chicago & M. Electric R. Co., 251 Fed. 510 22, 23, 25, 27, 32
Jesup v. Wabash Ry. Co., 44 Fed. 663 33
Jones v. Andrews, 10 Wall. 327 36, 38, 39
Johnson v. Christian, 125 U.S. 642 39
Julian v. Central Trust Co., 193 U.S. 93 30, 32
Karrick v. Trask, 238 Mass. 476 37
Kline v. Burke Construction Co., 260 U.S. 226 29, 30
Krippendorf v. Hyde, 110 U.S. 276 39
Lang v. Choctaw &c. R. Co., 160 Fed. 355 33
Leaf Tobacco Board of Trade, Ex parte, 222 U.S. 578 20
Leman, Adm., v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 40

	Page
Lewis v. Baltimore & L.R. Co., 62 Fed. 218	21
Lincoln v. Gay, 164 Mass. 537	35
Maryland v. Baldwin, 112 U.S. 490	14, 15
Minnesota Co. v. St. Paul Co., 2 Wall. 609	39, 40
Moore, In the matter of, 209 U.S. 490	36
Nelson v. Wentworth, 243 Mass. 377	35
New York Security & Trust Co. et al. v. Illinois Transfer R. Co., 104 Fed. 710	22
Northern Pacific Ry. v. Boyd, 228 U.S. 482	35
Odell v. H. Batterman Co., 223 Fed. 292	22
Patterson v. Pendexter, 259 Mass. 490	34
Riehle v. Margolis, 279 U.S. 218	31
St. Louis &c. Co. v. McBride, 141 U.S. 127	36, 38
Shields v. Thomas, 18 How. 253	36
Singer Furniture Corp., In re, 47 Fed. (2d) 780	19
Smith v. Missouri Pac. R. Co., 226 Fed. 653	33
Southern Pacific v. Bogert, 250 U.S. 483	34
Spiller v. St. Louis R. Co., 14 Fed. (2d) 284	34
Stewart v. Wisconsin Central Ry. Co., 117 Fed. 782	33
Sugg v. Thornton, 132 U.S. 524	38
Superior Trading Co., Inc., In re, 22 Fed. (2d) 480	35
Thames & Mersey &c. Co., Ltd., v. United States, 237 U.S. 19	38
Toland v. Sprague, 12 Pet. 300	36
United States v. Alex Dussel Iron Works, Inc., 31 Fed. (2d) 535	34
United States F. & G. Co. v. Kenyon, 204 U.S. 349	15
United States v. Babcock, 6 Fed. (2d) 160	33
United States v. Inaba, 291 Fed. 416	33
United States, ex rel., v. Ruggles, 221 Fed. 256	14
Venner v. Penn. Steel Co., 250 Fed. 292	39, 40
Western &c. Co. v. Butte &c. Co., 210 U.S. 368	36, 38
Whittaker v. Brictson Mfg. Co., 43 Fed. (2d) 485	21
Wilkinson v. Livingston, 45 Fed. (2d) 465	34

TABLE OF STATUTES AND RULES.

	Page
March 3, 1911, 36 Stat. c. 231, sec. 265, p. 1162	28
U.S. S.C. Eq. Rule 13, 226 U.S. 652	41

TABLE OF TEXTBOOKS.

Cyclopedia of Federal Procedure, sec. 2608	21

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 407.

GEORGE B. MONROE, RECEIVER,
Petitioner,
v.
LOUIS RAPHAEL,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

On July 14, 1930, a bill in equity for the appointment of a receiver for Monroe Stores, Inc. (hereinafter called The Stores), a Massachusetts corporation having an usual place of business in Massachusetts, was brought in the United States District Court for the District of Massachusetts (R. 1 and 2, par. A).

On July 23, 1930, the District Court appointed George B. Monroe of Quincy, Massachusetts, your petitioner, as receiver, and on the same day he gave bond and duly qualified (R. 2, par. D).

In compliance with an order of the District Court requiring all persons holding claims against The Stores to present their proofs therefor to the receiver for allowance on or before September 30, 1930 (R. 8, par. 3), Louis Raphael, a citizen and resident of Connecticut and the respondent herein, presented his proof of claim on September 25, 1930,

and on February 9, 1931, it was duly approved and allowed in the sum of $35,000 (R. 8, par. 4).

On November 25, 1930, one Harold F. Dempsey made an offer in writing to purchase from your petitioner, the receiver, all the assets of The Stores (R. 2 and 3, par. G, and R. 10-13). By the terms of this offer Dempsey agreed, among other things, to "pay thirty per cent of the claims of all the creditors of The Monroe Stores, Inc. in or within thirty days after their claims have been duly approved and allowed . . . said creditors shall include only those creditors who have filed their proof of claim with the Receiver pursuant to the order of this Court" (R. 10, par. 1), and "to pay any and all liabilities of the Receiver within thirty days after said claims against the Receiver have been duly allowed by this Court" (R. 11, par. 2), and to present to the District Court within seven days from the acceptance of the offer "a bond in the penal sum of $100,000.00 with good and sufficient sureties, the conditions of the bond being that if I perform the obligations of the offer said bond shall be null and void" (R. 12, par. 7). On November 26, 1930, this offer of Dempsey was duly accepted by your petitioner, the receiver, pursuant to an order of the District Court (R. 8, par. 2).

Thereafter, and pursuant to said offer, Dempsey filed a bond in the District Court (R. 8, par. 2), signed by himself as principal and Louis F. Buff and Clifford S. Drake as sureties, by the terms of which they were "bound and obliged unto the United States of America, in the full and just sum of $100,000 to the payment of which to the said United States of America, we bind ourselves," and on the condition that Dempsey "shall comply with all the conditions and items of said offer" (R. 13 and 14). Accompanying the bond were affidavits of the respective sureties, Buff and Drake, itemizing their respective assets and showing their net worth to be several hundred thousand dollars (R. 4-7). The bond and the sureties thereon were duly approved by the District Court on December 2, 1930 (R. 8, par. 2),

and the assets of The Stores were turned over to Dempsey by the receiver (R. 9, par. 6).

The amount to be paid Raphael, the respondent herein, under the terms of the offer, was $10,500 (R. 8 and 9, par. 4), but only $1200 was paid him on account of this sum (R. 9, par. 5), leaving an unpaid balance of $9300 (R. 33 and 34, par. 2). Accordingly, on March 12, 1931, more than thirty days after his claim against The Stores had been approved and allowed, Raphael "duly demanded" the payment of the amount due him (R. 8 and 9, par. 4). Thereafter, on March 23, 1931, Raphael filed a petition in the original receivership proceedings in the District Court, praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce" the obligation of Dempsey and his sureties on the bond (R. 7-9). On the same day the following order was entered by the District Court: "Petition allowed, leave to sue granted to petitioner, Louis Raphael" (R. 10).

Thereupon, on April 9, 1931, Raphael brought suit on said bond against Dempsey and his sureties in the Superior Court of the Commonwealth of Massachusetts (R. 3, par. I, and R. 34, par. 4). Said suit sought to reach and apply, under the Massachusetts statute, G.L. c. 214, sec. 3, cl. 7, certain shares of stock and other property of the defendants toward the payment of said balance of $9300 (R. 3, par. I). In this proceeding in the Massachusetts Court, Raphael obtained attachments upon the property of the sureties, Buff and Drake, and injunctions restraining the transfer by them of said properties (R. 36, par. 9). The case was referred to a master (R. 34, par. 5).

Dempsey was in default in paying the claims of the other creditors of The Stores and the liabilities of the receiver, as provided in the offer (R. 15, par. 4), and accordingly, on April 16, 1931, the receiver, your petitioner, filed an ancillary bill of complaint in the original receivership proceedings in the District Court, against said Dempsey and

his sureties, Buff and Drake, as obligors on the bond (R. 14-18), and in this ancillary bill the receiver sought to force Dempsey and his sureties to pay over to the Clerk of the District Court, for the use and benefit of the receiver, the creditors of the receiver and the creditors of The Stores, the balance due on account of the purchase price of the assets of The Stores (R. 17, par. 2). This balance included the remainder of the dividend due Raphael, the respondent herein (R. 3 and 4, par. J). On July 16, 1931, all parties to the bill consenting, a decree was entered by the District Court in which it was "ordered, adjudged and decreed that judgment for the plaintiff in the sum of $33,026.83, together with costs, be entered against the defendants," Drake, Buff and Dempsey (R. 20). This sum of $33,026.83 included the amount due Raphael (R. 3 and 4, par. J).

Nothing was obtained on execution on this judgment, and on October 7, 1931, the receiver, your petitioner, filed in the original receivership proceedings in the District Court a petition for contempt as to the defendants Buff and Drake, sureties on the bond (R. 21-24). The receiver alleged in this contempt petition that he was informed and believed, and upon such information and belief alleged, that said Buff and Drake were financially able to pay the full amount of the judgment rendered against them in the ancillary proceeding and had in their possession and control assets sufficient to satisfy said judgment in full (R. 23 and 24, par. 15). At the hearing on this contempt petition, all parties (the receiver, Dempsey, Buff and Drake) consenting, the District Court ordered the sureties to pay the receiver $1000 on the 20th of October, 1931, and a like sum on the 20th of each month thereafter until the execution issued on the judgment in the ancillary bill was satisfied, the final disposition of the matter being held pending further orders of the Court (R. 26). Pursuant to this order, the sureties, Buff and Drake, are paying $1000 a month to the counsel for the receiver (R. 4, par. K).

In the meantime the suit on the bond by Raphael against Dempsey and his sureties in the Massachusetts Court was prosecuted to a point where the master's report was filed, and was confirmed by the Court on October 20, 1931 (R. 35, par. 6). Thereafter, on November 13, 1931, Raphael filed a motion in the State Court proceeding for the entry of a final decree, and presented a form of draft decree (R. 35, par. 7). The master found that the sureties, Buff and Drake, owned and controlled certain stocks, mortgages and other properties (R. 47 and 48), but he did not make any finding as to the market value of said properties. The draft decree directs the sureties, Buff and Drake, to pay the respondent, Raphael, the sum of $9300, together with interest in the amount of $390.60 and costs, and on their failure to satisfy this indebtedness directs a special master to collect and sell their stocks, mortgages and other properties and use the proceeds thereof to satisfy the amount of the decree (R. 29, 30 and 31, pars. 4, 5 and 6).

On November 27, 1931, the receiver, your petitioner, filed a motion in the original receivership proceedings in the District Court, seeking to have modified the order of March 23, 1931, which granted Raphael, the respondent herein, leave to bring suit on the bond, and seeking to enjoin Raphael from further prosecuting his cause of action in the Massachusetts Court, "except insofar as to reduce his claim to judgment" (R. 27-28). Pursuant thereto an order of notice was issued, directed to the respondent, Raphael (R. 32). A copy of said order was served by the United States Marshal upon Mark Horblit (R. 32), the attorney who appeared for said Raphael on his petition for leave to sue on the bond (R. 9). No service of this order of notice was made on the respondent, Raphael, who is and was a resident of Connecticut (R. 7 and 33). Raphael filed a plea to this motion of the receiver on December 3, 1931 (R. 33-38), and after a hearing the District Court entered an order on December 7, 1931, modifying its order of March 23, 1931,

whereby Raphael was permitted to sue on the bond, and enjoining Raphael from further prosecuting his suit in the Massachusetts Court, except that he might proceed to judgment, but no further (R. 59 and 60). The District Court further ordered Dempsey and his sureties to pay Raphael the sum of $390.60 interest and his costs in the State Court proceeding, amounting to $171.10 (R. 60). A stenographic transcript of the hearing on this motion may be found at pages 51-59 of the record.

On December 28, 1931, Raphael filed an appeal from this order of the District Court, which was entered December 7, 1931, on the receiver's motion to modify (R. 60 and 61), together with an appeal bond (R. 62) and an assignment of errors in support of his appeal (R. 61 and 62).

The assignment of errors alleged (R. 61 and 62):

> "1. That the court erred in assuming jurisdiction over the appellant.
>
> "2. That the appellant being a resident of another State and being a litigant in another court, the District Court had (fol. 66) no jurisdiction to enjoin the appellant with respect to the proceedings in such other court.
>
> "3. That there was no such services of process upon the appellant as to warrant the issuance of the injunction against him.
>
> "4. That the motion on which the order was issued was not a sufficient or proper proceeding to warrant the issuance of said order.
>
> "5. That George B. Monroe, as receiver, has no legal or equitable interest in the State court proceedings referred to in said order and no standing to entitle him to an injunction against the appellant.
>
> "6. That there was error in failing to apply the equitable principles of laches and estoppel against the application made by the receiver in said motion.
>
> "7. That it was inequitable to enjoin the appellant

from proceeding with the State court proceedings referred to in the order.

"8. That the order was not warranted in the absence of evidence to support the application therefor.

"9. That the order interferes with the lawful prosecution by the appellant of the State court proceedings and thus deprives him of valuable rights.

"10. That it was inequitable to modify the order of March 23, 1931, after the appellant had in good faith instituted and prosecuted the State court proceedings under the authority thereof.

"11. That said order is erroneous in that it interferes with the appellant's legal and constitutional right to prosecute the State court proceedings therein referred to.

"12. That said order was not warranted by the record and was contrary to law."

On June 27, 1932, the Circuit Court of Appeals for the First Circuit reversed this order of the District Court entered on December 7, 1931, and remanded the case to that Court (R. 75). Mr. Justice Morton dissented from the majority of the Court. The opinion of the Circuit Court of Appeals and dissenting opinion of Mr. Justice Morton may be found at pages 64-74 of the record and at 60 Fed. (2d) 16.

The receiver, your petitioner, filed a petition for a writ of certiorari on September 27, 1932 (R. 75). This petition was granted by this Honorable Court and an order allowing certiorari was filed November 7, 1932 (R. 75).

Outline of Argument.

I. Introductory consideration.

II. The United States, through the receiver, its officer, is the real obligee of the bond and has the sole right to sue thereon. If an individual creditor can bring suit on the bond, it is only with the permission of the District Court.

III. At any time in its sole discretion, on motion of the receiver, your petitioner, the District Court could modify or withdraw its previous order granting the respondent, Raphael, leave to sue on the bond.

IV. The order of the District Court on December 7, 1931, modifying and withdrawing its previous order granting the respondent, Raphael, leave to sue on the bond and restraining the action which the respondent had brought in the Massachusetts Court pursuant to said leave, is not an abuse of the Court's discretion.

V. The order of the District Court on December 7, 1931, does not violate the provisions of section 265 of the Judicial Code, which prohibits a Federal Court from staying proceedings in a State Court.

VI. The order of the District Court on December 7, 1931, does not violate the equitable principles of laches and estoppel.

VII. The District Court did not err in assuming jurisdiction over the respondent, Raphael, on the receiver's motion to amend.

VIII. Conclusion.

Argument.

I.

Introductory Consideration.

The underlying consideration in this case concerns the orderly and equitable administration of the receivership of The Stores in the District Court.

When the assets of The Stores were sold, the bond was delivered to the Court in payment for the receivership property. The possession of this bond and control of its enforcement are both in the District Court, and the sole right of suit is vested in the receiver. An individual creditor, if he can sue on the bond at all, can only do so after obtaining permission from the Court itself. It is through the bond, in

fact, that the Court and the receiver have retained command of the situation. It is an integral part of the receivership.

On March 23, 1931, when Raphael, the respondent, petitioned the District Court that he be permitted to sue on the bond, there was no particular objection to allowing this creditor to institute an individual suit. The sureties, Buff and Drake, had filed affidavits showing that their net worth was several hundred thousand dollars (R. 4-7), and this sum was many times the amount for which they were obligated under the terms of the bond (R. 3 and 4, par. J). There was no thought of there being insufficient funds or assets to satisfy the obligation. Furthermore, the receiver had not brought suit on the bond at this time, for the purchaser had only been in default a few weeks and it was expected that the amount due would be paid.

On November 27, 1931, however, when the receiver, your petitioner, moved to amend the order of the District Court allowing Raphael to sue on the bond, the situation had changed materially.

In the meantime the respondent, Raphael, had instituted suit on the bond in the Massachusetts Superior Court pursuant to said permission (R. 34, par. 4), and had procured attachments and injunctions on practically all of the property of the sureties (R. 36, par. 9).

In the meantime, but subsequent to the institution of Raphael's action in the State Court, the receiver had brought suit on the bond for the amount of thirty per cent of the claims of all the creditors (R. 14-18), and had recovered a judgment in the sum of thirty-three thousand and twenty-six dollars and eighty-three cents ($33,026.83) (R. 20), including the unpaid balance of the claim of the respondent, Raphael (R. 3. and 4, par. J). This judgment had not been paid, and the receiver had petitioned the sureties for contempt (R. 21-24), alleging that they had filed affidavits showing their net worth to be several thousand dollars (R. 21 and 22, par. 6), and that he was informed and believed

that said sureties were financially able to pay the full amount of the judgment (R. 23 and 24, par. 15).

It then appeared that perhaps the sureties, Buff and Drake, had misrepresented their true wealth, and that the actual cash value of whatever assets they did possess was far less than the figures to which they had attested in their affidavits (see the remarks of the District Court at the bottom of page 54 of the record). The receiver, your petitioner, then realized that his information and belief as to the wealth of the sureties was not correct. He saw that whatever assets they did own were subject to the attachments and injunctions of the respondent, Raphael, in his suit on the bond in the Massachusetts State Court. Finding himself in this dilemma, he procured an order, on the petition for contempt, that the sureties pay him the sum of one thousand dollars ($1000) a month in liquidation of the amount of the judgment (R. 26).

About this time the suit of the respondent, Raphael, in the State Court was ripe for a final decree (R. 35, par. 6). A draft decree was filed, directing a special master to collect and sell the various properties of the sureties, Buff and Drake, to satisfy the individual claim of Raphael (R. 28-31). These assets consisted of equities in real estate, mortgages and unlisted stocks of relatively small business concerns (R. 29, 30 and 31, pars. 4, 5 and 6).

It is a matter of common knowledge in these days that equities in real estate are practically wiped out, that second mortgages are of no actual value and that unlisted securities in small businesses have no cash value, regardless of what the par value of the stocks may be. If these properties were actually sold, they would realize only a small fraction of their par value and their face value. There would be hardly enough to satisfy the individual claim of the respondent, Raphael, and the other creditors, and the receiver might be forced to go begging.

When confronted with these facts and possibilities, the receiver, your petitioner, moved the District Court to modify its previous order granting the respondent, Raphael, permission to sue on the bond, and to enjoin the prosecution of the State Court proceedings any further than judgment (R. 27 and 28). The situation was adequately expressed by counsel for the receiver at the hearing on this motion (R. 52):

> "Now, Mr. Horblit (counsel for Raphael) is entitled to his money without question, but the other creditors are also entitled to their money.
>
> . . . . . .
>
> "The situation as I see it is this: If the court permits the entry of the decree in the Superior Court it will handicap this court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this court as to the payment of the money, except put him in jail. I would rather have the money than put him in jail. That is my entire position in this case."

The majority of the Circuit Court were in error when they said (R. 71) that it was evident there was no question of preference by Raphael over the other creditors, because Raphael had alleged in his plea that Buff and Drake possessed property of a value far in excess of the amount of their obligation to all the creditors of The Stores, and because in the preparation of the record on the appeal in this case it was agreed by the parties that "The statements set forth in the plea of Louis Raphael . . . with respect to said proceedings in the Suffolk Superior Court . . . and with respect to the proceeding in said United States District Court . . . are true" (R. 3, par. I). Your petitioner points out that it was *agreed* that the *statements with regard to said proceedings in the State and Federal Courts* were *true*. There was *no agreement*, however, as to the *truth of the*

allegations in Raphael's plea or the facts set forth therein, *other than* the *fact that certain pleadings were filed* and the *fact that the Court took certain action* thereon.

The sureties, Buff and Drake, had misrepresented their true wealth, and whatever assets they did possess are of questionable value under present conditions. These assets are attached in the respondent's action on the bond in the Massachusetts Court and if they are sold to satisfy the respondent's claim in that proceeding they would probably not realize enough to cover the claims of the other creditors. As a practical result the respondent, Raphael, will obtain an inequitable preference to the disadvantage of the other creditors and the receiver, for the assets of the sureties will have been exhausted, leaving an empty obligation on the bond.

The consideration involved in this case is therefore purely one of the proper and orderly administration of a receivership in the Federal District Court and the equitable liquidation of the receivership estate.

II.

THE UNITED STATES, THROUGH THE RECEIVER, ITS OFFICER, IS THE REAL OBLIGEE OF THE BOND AND HAS THE SOLE RIGHT TO SUE THEREON. IF AN INDIVIDUAL CREDITOR CAN BRING SUIT ON THE BOND, IT IS ONLY WITH THE PERMISSION OF THE DISTRICT COURT.

The bond in question was given in the receivership and its obligation runs to "the United States of America" as obligee. It was given as part of the purchase price of the receivership property, and was imposed as a condition of the sale by the District Court, which was administering the estate.

The District Court, through the receiver, its officer, has undertaken to administer the assets of The Stores in an equitable manner for the benefit of all the creditors. It has

the duty of seeing that all the creditors receive equal treatment, a duty to see that each creditor receives his proportionate share of the assets. It is responsible for the administration and liquidation of the estate.

With this as a background, it would seem that the bond was given to the United States as the real obligee and that the receiver, the officer of the District Court of the United States, which is administering the receivership, has the sole right to sue upon it in the name and behalf of the United States for the ultimate benefit of all the creditors. It would seem that an individual creditor is neither an obligee nor a real party in interest, and cannot as a matter of right bring suit on the bond either in his own name or in the name of the United States. Therefore, if an individual creditor can sue on the bond at all in his own behalf, he much first get permission from the District Court to institute such a suit.

Any other construction of the bond flouts the common sense of the situation and the intention and duty of the District Court. It would lead to a multitude of individual suits by all of the creditors of the receivership, and if the assets of the sureties on the bond were insufficient to pay all of the creditors one hundred per cent of the amount of their just due, we would be faced with a curious spectacle of one creditor competing against the other creditors to obtain a preference to which he is not entitled through the means which were adopted to safeguard the equitable payment of the purchase price for which the receivership property was sold. It would lead to a free-for-all on the bond, in which the prize, the assets of the obligors, would go to the quickest and the smartest. It is obvious, therefore, that the District Court, through the receiver, its officer, retained control of the situation through the bond. This construction was adopted by Mr. Justice Morton in his dissenting opinion in the Court below (R. 73 and 74):

> "I also differ from my brethren in their construction of the bond, as being suable by individual creditors for

their own benefit. It is conditioned only that Dempsey shall fulfill his contract with the receiver; there is nothing in it about creditors or their claims. In my opinion it was suable only on the relation of the receiver by whom it was taken and with whom the contract which it secured was made. The present bond differs from those given to protect material men, in that a receiver is here interposed between the creditors and the obligors."

The authorities to support or refute the above analysis and construction of the bond in question are surprisingly sparse, and none of them are mandatory on this Honorable Court. Most of the cases involve the official bonds of clerks of court, administrators, trustees in bankruptcy, or the like, and most of the bonds are given under the requirements of a statute. Furthermore, in none of them is there interposed between the principal and sureties on the bond and the ultimate beneficiaries, any officer who represents said beneficiaries and could sue for them all.

Cases of this sort have been cited by the respondent, Raphael, on his brief in the Court below and on his brief against certiorari in this Court. For the most part they hold that the injured party is the real party in interest on the bond, so that it is his citizenship which is taken into consideration in determining a question of Federal jurisdiction on the ground of diversity of citizenship.

Maryland v. *Baldwin*, 112 U.S. 490.
Howard v. *United States*, 184 U.S. 676.
United States, ex rel., v. *Ruggles*, 221 Fed. 256.
Alexander v. *Union Surety & Guaranty Co.*, 85 N.Y. S. 282.

Such cases, however, do not control the construction of the bond in the case at bar. The facts of this case and the background surrounding this bond are sufficient to distin-

guish it from the authorities cited above. This bond is not an official bond, nor is it required by statute. It is purely a requirement of the District Court as part of the purchase price of the assets of the receivership. Furthermore, the receiver, the officer of the District Court, is interposed between the purchaser of the assets and his sureties on the one hand and the creditors of the receivership on the other. There is an intermediate party representing all of the ultimate beneficiaries, an officer to sue upon the bond.

In *U.S. F. & G. Co.* v. *Kenyon*, 204 U.S. 349, this Court considered cases of the sort above suggested by the respondent, Raphael, including the case of *Maryland* v. *Baldwin*, *supra*. Yet, in the face of these authorities, this Court held that the United States, named as obligor of a contractor's bond, was a real party in interest. To be sure, that bond was given pursuant to a Federal statute for the benefit of material men and laborers on Federal construction projects, and to be sure this Court merely held that the United States was a real party in interest on the bond for the purpose of determining Federal jurisdiction. Nevertheless, this Court distinguished the bond in that case from the bonds in the authorities above cited, and based its distinction on the background surrounding a Federal construction bond, the interest and duty of the United States, the party which required the bond, and the results of such construction. At pages 356 and 357 this Court said:

> "This case differs from those just cited and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain

materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building . . . The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the Government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was therefore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for the labor and materials furnished to him in his work. There is therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion . . . that it is not an unreasonable construction of the words in the Judiciary Act of 1887-88, 'or in which controversy the United States are plaintiffs or petitioners,' to hold that the United States is a real party and not a mere nominal plaintiff in the present action, and therefore the Circuit Court had jurisdiction."

The background surrounding the giving of the bond, the interest and duty of the party requiring the same, and the

results of its possible constructions, are equally as important factors in determining the construction of the bond in the case at bar and distinguishing it from those in the cases cited by the respondent, as they were in the Kenyon case.

The respondent, Raphael, in his brief in the Court below and in his brief against certiorari in this Court suggests that under the terms of the offer the obligation of the purchaser, Dempsey, to pay thirty per cent of the claims runs directly to the individual creditors, and from this he argues that the obligation of the principal and sureties on the bond also runs directly to the creditors. This conclusion, however, does not necessarily follow, because, even though the obligation of the purchaser under the terms of the offer runs directly to the individual creditors, as the respondent maintains, nevertheless, the obligation of the principal and sureties on the bond runs to the petitioner, the receiver.

If the purchaser's obligation were fufilled, it would matter little whether it were paid to the receiver or directly to the creditors. The result would be the same, for in either event each creditor would receive his just share and the liquidation of the assets of the receivership would be orderly and equitable. If the purchaser's obligation were not fulfilled, however, it would become rather imperative that some control of the liquidation be retained by the District Court and the receiver. Otherwise the orderly and equitable administration and liquidation of the receivership estate would be prejudiced, and the duties and interest of the District Court would be thwarted. Therefore the District Court, through the receiver, must have retained control of the situation through the obligation of the principal and sureties on the bond.

The respondent, Raphael, has also suggested in his previous briefs that the sureties, Buff and Drake, and the District Court have recognized that the obligation of the sureties on the bond ran directly to the individual creditors. The sureties themselves have paid $1200 to the respondent,

Raphael, and the District Court has granted the respondent's petition for leave to sue on the bond.

In answer to these observations, your petitioner says that the action of the sureties in paying $1200 directly to the creditor, Raphael, in no way binds the receiver to any particular construction of the bond, and the action of the District Court in granting Raphael permission to sue is not inconsistent with the construction contended for in this argument. At no time has your petitioner or the District Court ever maintained that the obligation belonged to the individual creditors as a matter of right. On the other hand, in the order on the contempt petition the Court expressly stipulated that the sureties pay $1000 a month, not to the creditors nor the Clerk of Court, but to the receiver (R. 26). Moreover, when the respondent, Raphael, petitioned the Court for leave to sue (R. 7-9), he admitted that the obligation of the bond did not run to the creditors individually as a matter of right.

In the case of *Illinois Surety Co.* v. *United States*, 226 Fed. 665, the Circuit Court of Appeals for the Seventh Circuit held that a suit on a depository bond given under the provisions of the Bankruptcy Act should be brought in equity for the benefit of all the interested parties. At page 668 Mr. Justice Mack said:

> "The object of the bond is to afford protection to all beneficiaries alike. The spirit of the whole Bankruptcy Act would be violated, if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled only to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of later litigants. Only in a proceedings

in which all interested parties will have an opportunity to be heard, and resulting in a judgment or decree that will be res judicata as to the surety as well as to all depositors, can justice be done."

This quotation has been cited with approval in the case of *In re Singer Furniture Corp.*, 47 Fed. (2d) 780, at 783, but the holding of the case has been limited by this Court in *Illinois Surety Co.* v. *United States to the Use of Peeler*, 240 U.S. 214, where it was held that a suit on a contractor's bond would not lie in equity, but only at law. Recent authorities have sought to reconcile the decision of Mr. Justice Mack and the holding of the Peeler case by pointing out that in the former case the amount of claims exceeded the amount of the bond which secured them, while in the latter case the bond was ample to take care of the claims which it secured.

Bolser v. *United States*, 26 Fed. (2d) 4, at 9.
Fidelity & Deposit Co. of Maryland v. *United States*, 35 Fed. (2d) 940, at 941.

Your petitioner merely cites the case of *Illinois Surety Co.* v. *United States, supra*, and the language of Mr. Justice Mack as persuasive authority for the construction of the bond in the case at bar, herein contended for.

The object of the bond was to insure the proper administration of the receivership and the object of the receivership was to secure to each creditor his proportionate share of the estate in liquidation. This purpose would be violated if a "vigilant" creditor could bring suit on the bond in his own behalf, for in this manner he could to all practical purposes exhaust the obligation (see point I of this argument). These observations must be taken into consideration in determining the construction of the bond.

III.

AT ANY TIME IN ITS SOLE DISCRETION, ON MOTION OF THE RECEIVER, YOUR PETITIONER, THE DISTRICT COURT COULD MODIFY OR WITHDRAW ITS PREVIOUS ORDER GRANTING THE RESPONDENT, RAPHAEL, LEAVE TO SUE ON THE BOND.

The order of the District Court allowing the respondent, Raphael, to sue on the bond, if it amounted to anything, was an administrative and discretionary order. It did not amount to a final decree which cannot be modified on motion and which cannot be appealed from in another term of court.

The bond was given to the District Court and the receiver, its officer, in return for the sale of the receivership assets. The control of the bond is vested exclusively in the Court. The receiver alone can sue upon it as a matter of right, and if the Court in the exercise of its discretion can allow an individual creditor to sue upon it, surely this same Court can modify or withdraw the permission at any later date in its sole discretion. Certainly the Court is not bound irrevocably to allow the creditor to consummate his individual suit in the State Court. Facts subsequently arising, or new light coming to the Court as to then existing conditions, may demand some modification of the Court's permission.

An order of a Court issued on a petition of a third party to intervene in a suit pending in that Court is not usually a final decree. It is rather a discretionary order which is not appealable.

Ex parte Cutting, 94 U.S. 14, at 22.

Credits Commutation Co. v. United States, 177 U.S. 311, at 317.

Ex parte Leaf Tobacco Board of Trade, 222 U.S. 578, at 581.

City of New York v. Consolidated Gas Co. of N.Y., 253 U.S. 219, at 221.

City of New York v. *N.Y. Tel. Co.*, 261 U.S. 312, at 316.

Lewis v. *Baltimore & L.R. Co.*, 62 Fed. 218, at 221 and 222.

Blaffer v. *New Orleans Water Supply Co.*, 160 Fed. 389, at 391.

Barceloux v. *Buffum*, 51 Fed. (2d) 82, at 85.

In the usual case of a petition of a third person to intervene in a particular action, the denial of the petition concludes no rights, for the petitioner is left free to assert his claim in another proceeding or another tribunal. Intervention is not usually a matter of right.

Exceptional circumstances do arise in certain cases, however, as a result of which the denial of the petitioner's request to intervene amounts to a definite determination of the rights of the petitioner. In a few of these peculiar cases the petitioner may not be able to assert his right other than in the action in which he sought to intervene. In such cases there is a final disposition of the petitioner's claim, denying all relief, and the order of the Court refusing intervention is a final decree which is appealable. In such cases intervention is a matter of right.

Credits Commutation Co. v. *United States*, *supra*, at 315 and 316.

City of New York v. *N.Y. Tel. Co.*, *supra*, at 317.

Whittaker v. *Brictson Mfg. Co.*, 43 Fed. (2d) 485, at 489.

Barceloux v. *Buffum*, *supra*, at 85.

Cyclopedia of Federal Procedure, sec. 2608.

The elements determining whether an order be a final decree or a discretionary order are the same in the case of petitions for leave to sue a receiver. If the order involves a determination of a substantial right in such a manner as

to leave a party with no adequate relief, the order is a final decree and is appealable.

An order granting leave to sue in a State Court, a receiver appointed by a Federal Court, has been held to be an administrative, discretionary order, and not an appealable, final decree.

> *New York Security & Trust Co. et al.* v. *Illinois Transfer R. Co.*, 104 Fed. 710.
> *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co.*, 251 Fed. 510, at 512 and 513.

In the case of *Odell* v. *H. Batterman Co.*, 223 Fed. 292, however, the Court held that the denial of a landlord's petition to be allowed to bring an ejectment proceeding in a State Court against a receiver appointed by a Federal Court, was a final decree and appealable. This holding was based on the assumption that the order of the Court refusing leave to bring the ejectment suit in the State Court was, in effect, a refusal to allow the adjudication of the landlord's claim in any sort of proceeding. Therefore the Odell case may be classed as one of those peculiar situations in which the denial of the petition amounts to a disposition of the claim, denying all relief.

> See *Field* v. *Kansas City Refining Co. et al.*, 296 Fed. 800, at 806.

The order of the District Court granting Raphael permission to sue on the bond was an administrative, discretionary order, and not a final decree. Unlike the Odell case, there was no determination of a substantial right against the respondent so as to leave him with no adequate relief. The request for permission was not denied, and no definite status was created.

Even though Raphael's petition to be allowed to sue had been refused, the order of the Court denying this petition would nevertheless still have been a discretionary order.

Raphael could not sue on the bond as a matter of right, for that right was vested in the receiver who included the amount of Raphael's claim in the sum for which he brought his ancillary bill against the sureties on the bond (R. 20, and R. 3 and 4, par. J). Therefore the respondent's claim was duly protected, and the denial of his petition for leave to sue would not have precluded him from all relief.

The order granting Raphael leave to sue on the bond, being an administrative and discretionary order, may be modified or revoked at any time by the District Court on motion of the receiver.

In the case of *Buckhannon & N.R. Co.* v. *Davis,* 135 Fed. 707, a Federal District Court had granted permission to bring suit in a State Court against a receiver appointed by the Federal Court. At a later date the receiver filed a motion to set aside the order giving permission to sue and restraining the action in the State Court. The receiver's motion was allowed, the Court saying, at page 709:

> "It is contended by the appellant that the Court did not have power to revoke, annul, or modify its order of October 27, 1903, which granted permission to sue the receiver, and reserved the question as to the forum in which the suit should be brought. The Court undoubtedly had the right to attach any reasonable condition to the order which granted permission to sue the receiver, and, if necessary, to modify or revoke any order which it might have improvidently granted."

In the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* the order of a Federal Court allowing suit against its receiver in a State Court was vacated, and the proceedings in the State Court were enjoined. At page 512 and 513 the Court said:

> "The prime end to be served is the due and proper conservation of the property in the hands of the court,

in order that there may be prompt and proper administration thereof for the benefit of all having any interest therein. If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave.

"Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the Court is administering . . . The order granting leave is not final in the sense that thereby a definite status is fixed.

. . . . . .

"We are of opinion that under the circumstances the order granting leave to sue the receiver in the state court was revocable at the discretion of the court which granted it, and that the order revoking the leave and enjoining appellant from prosecuting the lien elsewhere than in the District Court was a proper order to be entered, unless from all the facts appearing the District Court abused its discretion in that regard."

By analogy from the two authorities just cited above there would seem to be no doubt but that on motion of the receiver the District Court could at any time in its sole discretion modify or withdraw its previous order granting Raphael permission to sue on the bond. The District Court through the bond has complete control of the obligation thereon. The sole right to sue on it is vested in the receiver, and if

the Court can grant an individual creditor leave to sue, it can certainly modify or revoke such permission in its sole discretion on motion of the receiver, its officer.

IV.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, MODIFYING AND WITHDRAWING ITS PREVIOUS ORDER GRANTING THE RESPONDENT, RAPHAEL, LEAVE TO SUE ON THE BOND AND RESTRAINING THE ACTION WHICH THE RESPONDENT HAD BROUGHT IN THE MASSACHUSETTS COURT PURSUANT TO SAID LEAVE, IS NOT AN ABUSE OF THE COURT'S DISCRETION.

Perhaps the District Court should have refused Raphael's request to be allowed to sue on the bond and retained the enforcement of the bond and the administration of the estate within its exclusive supervision. In any event it would probably have led to a more orderly administration of the receivership.

At the time of the filing of the petition for leave to sue there was no particular objection to allowing the creditor, Raphael, to sue on the bond in his own behalf. After permission was granted, however, and action was commenced in the Massachusetts Court pursuant to said leave, the situation changed. New facts subsequently arising and new light as to then existing conditions demanded that the leave to sue be recalled in order to best subserve the proper administration of the estate.

> See *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra*, at 512.

The orderly and equitable administration of the receivership was threatened by the action which Raphael had commenced in the State Court. If this action were allowed to continue to execution and the sale of the sureties' assets, which were attached therein, it would probably have resulted in an inequitable preference to Raphael at the expense of the

other creditors (see point I of this argument). The situation is ably presented by Mr. Justice Morton in his dissenting opinion in the Court below (R. 73 and 74):

> "The suit by the receiver and his recovery of a complete judgment covering the claims of all parties under the bond greatly changed the situation from what it was when leave to sue in the State Court was granted to Raphael. It became a question whether one creditor should be allowed to press his claim in competition with the receiver who was acting for all creditors and for the estate. In forbidding him from doing so, I think the District Judge was plainly right. The contrary view leads to the curious spectacle of one creditor being permitted to compete against the receiver and the other creditors, to obtain preference to which he is not entitled, through the means which were adopted to safeguard the payment of the purchase price for which the receivership property was sold. Raphael's complaint against the injunction order is that it deprives him of this advantage and puts him on an equality with the other creditors,—which I think is where he belongs, while my brethren apparently think him entitled to his preference.
>
> . . . . . .
>
> "The Dempsey bond and all proceedings on it were, essentially, parts of the liquidating receivership in the District Court. The whole thing ought to have been retained there. The order permitting suit in the State Court, if it amounted to anything, was ill-advised. The District Judge was right in recognizing that fact and revoking the order."

The respondent, Raphael, is deprived of no right or advantage that was his as a matter of right. He is merely put on an equality with the other creditors, which is where he

belongs. His claim has been protected by the receiver. It was included in the sum for which judgment was obtained in the ancillary proceedings on the bond, instituted by the receiver for the benefit of all the creditors.

In the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* a District Court vacated its previous order granting leave to sue its receiver in a State Court and enjoining the prosecution of the suit in question in any Court but the Federal Court. In the case of *Field* v. *Kansas City Refining Co., supra,* a District Court ordered that an appellant file his claim in the receivership proceedings in the Federal Court, and also for protection authorized him to sue the receiver in the State Court, enjoining the State Court proceedings after the commencement of the suit.

In both of the above-cited cases the State Court action was enjoined, but in each instance the creditor's claim was protected in the Federal Court. So, in the case at bar, the action which Raphael had commenced in the Massachusetts Court was enjoined, but his claim was protected in the receiver's ancillary bill.

The order of the District Court revoking its previous leave to sue and enjoining the State Court proceedings is in no way inequitable or prejudicial to the respondent. A fair allowance was made in the order for interest and costs in the proceeding in the Massachusetts Court (R. 59 and 60). Mr. Horblit, counsel for the respondent, assented to the amount of these items (R. 55). It was said in the case of *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra,* at 513:

> "If in the matter of expense or convenience appellant is prejudiced by the order, the District Court is empowered to make such adjustment as equitable considerations would suggest; . . ."

The respondent has complained that he will lose attachments in the State Court proceeding by expiration if that

case be prosecuted to judgment and enjoined thereafter. But how is he prejudiced by this? He had no right to sue on the bond and to get these attachments in the first place. It was only by permission of the District Court that this was possible. Therefore, in taking away what the Court in its, perhaps, ill-advised discretion allowed him to have, he is in no way subjected to any hardship. As was pointed out by Mr. Justice Morton, it merely puts him on a par with the other creditors, which is where he belongs.

If Raphael's contention as to the loss of his attachments be correct, however, and if this be deemed to be an objection to the order, the Court can easily protect the respondent by merely amending the order and the injunction to restrain him from prosecuting the State Court proceedings to judgment, instead of restraining him from prosecuting the action further than judgment. In this manner the attachments would not be lost by expiration after the entry of judgment, as suggested by the respondent, because judgment would not be entered.

V.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, DOES NOT VIOLATE THE PROVISIONS OF SECTION 265 OF THE JUDICIAL CODE, WHICH PROHIBITS A FEDERAL COURT FROM STAYING PROCEEDINGS IN A STATE COURT.

The rule laid down by section 265 of the Judicial Code is merely an enactment of the rules of comity between the Federal and the State Courts. It provides as follows (36 Stat. c. 231, sec. 265, p. 1162):

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This rule is not only one of comity, to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons; it is also a principle of right and of law between State Courts and those of the United States.

Covell v. *Heyman*, 111 U.S. 176, at 182.
Kline v. *Burke Construction Co.*, 260 U.S. 226, at 229 and 230, and 231.

The background and the purpose of the rule and of the statute were ably stated by this Court in the Covell case, *supra*, at page 182:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void . . ."

It is recognized, however, that the rule and statute were not intended to limit the power of the Federal Courts to enforce their authority in cases that on other grounds are

within their proper jurisdiction. Therefore, in aid of its own jurisdiction properly acquired and in order to render effectual its judgments and decrees, a Federal Court may restrain proceedings in a State Court which would have the effect of defeating or impairing such jurisdiction.

Dietzsch v. *Huidekoper*, 103 U.S. 494, at 497.
Julian v. *Central Trust Co.*, 193 U.S. 93, at 112.
Hill v. *Burr*, 234 U.S. 712, at 723.
Kline v. *Burke Construction Co., supra*, at 229.

If a Federal Court has in its control and jurisdiction a specific matter, a specific thing, that *res* is withdrawn from the control and jurisdiction of the judicial power of the State Courts. Any exercise of jurisdiction by a State Court over this same matter or this same *res* prejudices and impairs the jurisdiction of the Federal Court which has already attached. Accordingly a Federal Court may restrain such proceedings in a State Court without violation of the statute or the rules of comity.

The case at bar presents just such a situation. The District Court has properly acquired jurisdiction of the administration of the receivership of The Stores, and in order to render the administration of said estate effectual and equitable, it was compelled to restrain the proceedings in the Massachusetts Court, which would have had the effect of impairing and defeating said administration.

The bond is an integral part of the receivership, a *res* in the possession and control of the District Court. It was given in return for the assets of The Stores, as a part of the purchase price and an instrument in the liquidation of these assets. Certainly it cannot be denied that a State Court could not interfere with any property previously subjected to the control of a Federal Court, any property subjected to administration and liquidation in a Federal Court. How does it differ, then, if these assets have been exchanged for a bond?

In the case of *Dietzsch* v. *Huidekoper, supra,* this Court said, at page 497:

> "The bond took the place of the property seized in replevin, and a judgment upon it was equivalent to an actual return on the replevied property."

The United States, through the receiver, its officer, is the sole obligee, with the sole right to sue on the bond, and an individual creditor can bring suit on it only with the permission of the District Court, if in truth he can sue on it at all. The bond and the obligation thereon are subject to the exclusive control of the District Court. Surely, then, said Court can restrain an action on the bond by the creditor, Raphael, in the Massachusetts Court, if only in this manner it could render effectual and equitable the liquidation of the assets of The Stores and the administration of the receivership.

In the case of *Richle* v. *Margolis,* 279 U.S. 218, at 223, it was said:

> "The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets. And it may despite § 265 of the Judicial Code, issue under § 262 or otherwise, all writs necessary to protect from inference all property in its possession."

In the following cases cited under point III of this argument a Federal Court had given permission to sue its receiver in a State Court and at a later date restrained the proceedings which were commenced in the State Court pursuant to said leave to sue:

Buckhannon & N.R. Co. v. *Davis, supra.*

Investment Registry, Ltd., v. *Chicago & M. Electric R. Co., supra.*
Field v. *Kansas City Refining Co., supra.*

The injunction in the case at bar against Raphael's suit on the bond in the Massachusetts Court is no more objectionable to the statute and the rules of comity than the injunction against the action in the State Court in the above cases. The District Court controls the right to sue, and an individual creditor cannot enforce the bond as a matter of right, since the obligation runs directly to the District Court and the receiver, its officer. That which the Court can give it can certainly take away.

In *Investment Registry, Ltd.*, v. *Chicago & M. Electric R. Co., supra*, it was said, at page 513:

> "Under such circumstances there is involved no question of comity between different courts, but only that of the best interest of the estate which the court is administering."

In the case of *Julian* v. *Central Trust Co., supra*, a railroad mortgage was foreclosed in a Federal Court and the property was sold pursuant to its order. The terms of the sale provided that the purchaser should pay all claims which were filed in the case and adjudged by the Court to be prior in lien to the mortgage foreclosed in the suit. They also reserved to the Court the right to retake and resell the property if the purchaser failed to comply with the terms of sale. A creditor obtained a judgment in a State Court against the former owner of the property and sought to levy on the property itself in satisfaction of his judgment. The Federal Court, however, restrained this levy in State Court proceedings in order to protect its prior jurisdiction and render effective its decree. At page 112 the Court pointed out that the provisions in the decree of sale in the Federal Court made it apparent that the intention of the Court was to re-

tain jurisdiction for the purpose of settling and determining what liens and demands the purchaser of the property should have to pay.

On the sale or disposition of receivership property in the following cases, a Federal Court retained some control over the administration of the property and estate, and, as in the Julian case, it had the right to enjoin proceedings in a State Court which interfered with its jurisdiction and said administration.

Jesup v. *Wabash Ry. Co.*, 44 Fed. 663.
Fidelity Insurance T. & S.D. Co. v. *Norfolk & W. R. Co.*, 88 Fed. 815.
Stewart v. *Wisconsin Central Ry. Co.*, 117 Fed. 782.
Lang v. *Choctaw &c. R. Co.*, 160 Fed. 355
Smith v. *Missouri Pac. R. Co.*, 266 Fed. 653.

By the same token it is apparent that in the case at bar the District Court intended to retain control of the liquidation and administration of the receivership of The Stores. Its possession of the bond and control of the obligation thereon are sufficient evidence of this fact.

The United States, through its officer, the receiver, has the sole right of action on the bond, and for this reason it would seem that the District Court could enjoin an action on the bond in a State Court by an individual creditor without violation to section 265 of the Judicial Code and the rules of comity. It does not seem that this statute was intended to apply to a situation wherein the United States is the exclusive party in interest.

United States v. *Inaba*, 291 Fed. 416, at 420.
United States v. *Babcock*, 6 Fed. (2d) 160, at 161.

VI.

THE ORDER OF THE DISTRICT COURT ON DECEMBER 7, 1931, DOES NOT VIOLATE THE EQUITABLE PRINCIPLES OF LACHES AND ESTOPPEL.

The essence of laches is not merely the lapse of time. It is principally a question of the inequity of allowing a claim to be enforced or an action taken, and unless the adverse party will be prejudiced, he cannot be heard to object. Two elements are essential: inexcusable delay and prejudice resulting therefrom.

Galliher v. *Cadwell*, 145 U.S. 368, at 372.

Southern Pacific v. *Bogert*, 250 U.S. 483, at 488 and 490.

Spiller v. *St. Louis R. Co.*, 14 Fed. (2d) 284, at 288.

Farmers' Bank v. *Halsey Stuart & Co.*, 21 Fed. (2d) 818, at 822.

United States v. *Alex Dussel Iron Works, Inc.*, 31 Fed. (2d) 535, at 536.

S. O. Haynes & Co. v. *Druggists' Circular*, 32 Fed. (2d) 215, at 217.

Fidelity & D. Co. of Maryland v. *Farmers' Bank*, 44 Fed. (2d) 11, at 19.

Wilkinson v. *Livingston*, 45 Fed. (2d) 465, at 469.

Patterson v. *Pendexter*, 259 Mass. 490, at 493.

Cohen v. *Bailly*, 266 Mass. 39, at 49.

Calkins v. *Wire Hardware Co.*, 267 Mass. 52, at 69.

Carter v. *Sullivan*, 1932 Mass. Adv. Sheets, 2113, at 2120 and 2121.

Likewise, for estoppel there must be more than mere delay. Unless the non-action operated to the prejudice of the

adverse party, there is no estoppel arising from the mere lapse of time.

Northern Pacific Ry. v. *Boyd,* 228 U.S. 482, at 509.
Fisher v. *Clark,* 22 Fed. (2d) 295, at 296.
In re Superior Trading Co., Inc., 22 Fed. (2d) 480, at 483.

A person seeking to invoke the doctrine of estoppel must have changed his position to his prejudice or injury as a result of reliance upon the action or conduct of the other party.

Lincoln v. *Gay,* 164 Mass. 537.
B. & A. R.R. Co. v. *Reardon,* 226 Mass. 286.
Nelson v. *Wentworth,* 243 Mass. 377.
Dodd & Co. v. *Tarr,* 251 Mass. 189.

The respondent, Raphael, cannot therefore object to the modification of the permission which the District Court had given him to sue on the bond. The receiver's delay in seeking such modification is not inexcusable, and the respondent can show no prejudice. Estoppel and laches are not involved.

Perhaps the granting of permission to Raphael to sue on the bond was ill-advised and had better been denied. Nevertheless, there was no particular reason at the time that demanded the refusal of his request to be allowed to sue. Some months later, however, the true situation came to light, and the receiver then sought to modify the leave which the Court had previously granted. Under these circumstances the delay is not inexcusable (see point I of this argument).

The respondent was in no way prejudiced by this delay, if it may be called delay. His costs in the action which he had commenced in the Massachusetts Court, and interest on the amount of his claim, were awarded him by the District Court. He was merely placed *in statu quo,* on a par with

the other creditors. He was merely placed where he would have been if the Court had not granted him the permission to sue. He was not deprived of anything that was his as a matter of right. Therefore, there was nothing inequitable in the order revoking the previous permission, for it merely took away from the respondent the inequitable advantage which the District Court had unwittingly given him (see point IV of this argument).

VII.

THE DISTRICT COURT DID NOT ERR IN ASSUMING JURISDICTION OVER THE RESPONDENT, RAPHAEL, ON THE RECEIVER'S MOTION TO AMEND.

If the District Court had no personal jurisdiction over the respondent or if action were brought in the wrong venue, the respondent could have appeared in the proceeding for the special purpose of objecting on these grounds, without subjecting himself to the jurisdiction of the Court. On the other hand, if he appeared generally in the proceeding, he is deemed to have waived any objection he might have had, for a general appearance cures all defects and irregularities pertaining to personal jurisdiction and venue.

Toland v. *Sprague*, 12 Pet. 300, at 320 and 321.
Shields v. *Thomas*, 18 How. 253, at 259.
Jones v. *Andrews*, 10 Wall. 327, at 332.
Fitzgerald &c. Co. v. *Fitzgerald*, 137 U.S. 98, at 105.
St. Louis &c. Co. v. *McBride*, 141 U.S. 127, at 130, 131 and 132.
Central Trust Co. of N.Y. v. *McGeorge*, 151 U.S. 129, at 132 and 133.
Interior &c. Co. v. *Gibney*, 160 U.S. 217, at 219 and 220.
In the matter of Moore, 209 U.S. 490, at 501.
Western &c. Co. v. *Butte &c. Co.*, 210 U.S. 368, at 370 and 372.

If the respondent, Raphael, was a resident of Connecticut and received no personal service of the order of notice on the receiver's motion, nevertheless he cannot be heard to object that the District Court did not have personal jurisdiction over him and power to enjoin him from prosecuting his action in the Massachusetts Court. Neither can he object that the receiver's motion should have been brought in the Federal District Court for Connecticut. These objections were merely personal privileges and exemptions which he has waived by appearing generally on the receiver's motion.

Pursuant to the order of notice and on the return day thereof the respondent filed a plea in which he recited at length the facts of the situation (R. 33-36, pars. 1-8), and joined various allegations attacking the merits of the motion (R. 36-38, pars. 9-12, and 14 and 15), with only one allegation attacking the jurisdiction and venue of the Court (R. 37, par. 13). The only indication that this appearance was to be restricted to objection to the jurisdiction was the words "appearing specially," which were found in the introduction (R. 33). These words, however, would seem to be contradicted by the prayer at the end of the plea (R. 38), which asks that the receiver's motion be denied rather than that it be dismissed for lack of jurisdiction.

An appearance which is not limited to some specific ground of objection to the jurisdiction of the Court is usually a general appearance, *Finance Corp. of New England* v. *Parker*, 251 Mass. 372, at 376, and any defense which goes to the merits of the proceeding submitted the defendant to said jurisdiction notwithstanding the fact the appearance was labelled "special." No words of reservation can make an appearance special which in fact goes to the merits.

Karrick v. *Trask*, 238 Mass. 476, at 478.
Crawford v. *Foster*, 84 Fed. 939, at 941.

The combination of a special plea to the jurisdiction and a plea to the merits of the proceeding, both in the same ap-

pearance, overrules the special plea and raises it to a general appearance. It is in substance an appearance to the merits, and submits the respondent to the jurisdiction of the Court.

Jones v. *Andrews, supra,* at 332.
Sugg v. *Thornton,* 132 U.S. 524, at 529 and 530.
St. Louis &c. Ry. Co. v. *McBride, supra,* at 130.
Western &c. Co. v. *Butte &c. Co., supra,* at 370 and 372.
Thames & Mersey &c. Co., Ltd., v. *United States,* 237 U.S. 19, at 24.
Crawford v. *Foster, supra,* at 941.
Christensen v. *Christensen,* 14 Fed. (2d) 475, at 476.
Currier v. *Beard,* 216 Mass. 113, at 114 and 115.

In the light of this analysis there would seem to be no doubt but that the respondent's plea amounted to a general appearance. It is not restricted to objection to the jurisdiction, but attacks the merits of the proceeding as well and prays that the motion be denied rather than that it be dismissed for lack of jurisdiction. Therefore, in spite of the wording of the introduction, "appearing specially," and the allegation objecting to the jurisdiction, the plea is in and of itself substantially a general appearance.

This conclusion is borne out by the fact that, at the hearing on the motion, on the same day on which the plea was filed, the respondent, Raphael, did not object to the jurisdiction of the Court. Counsel merely argued on the merits of the matter and the transcript of the hearing reveals no mention of, or objection to, the jurisdiction (R. 51-59). This action or conduct of the respondent at the hearing on the motion determines the nature of his appearance without any shadow of doubt, for it indicates his true intention and the extent of the operation of his plea.

The jurisdiction and venue of the District Court in this matter, however, does not depend upon the general appearance of the respondent, Raphael, for the receiver's motion was an ancillary proceeding, supplementary to the original receivership and the respondent's petition for leave to sue. Raphael had previously subjected himself to the jurisdiction of the Court in the parent proceeding when he proved his claim in the receivership and filed the petition for leave to sue. This jurisdiction carried over to the present motion for the jurisdiction to maintain all such dependent and ancillary matters is referable to the original parent proceeding.

Freeman v. *Howe*, 24 How. 450, at 460.
Jones v. *Andrews*, *supra*, at 333.
Krippendorf v. *Hyde*, 110 U.S. 276, at 280 and 281.
Johnson v. *Christian*, 125 U.S. 642, at 646.
Eichel v. *U.S. Fidelity &c. Co.*, 245 U.S. 102, at 104.

A proceeding which is designed to regulate, control and enforce or restrain the decrees of an original action and to further deal with the administration of a matter within the control of the Court, to the end that more complete justice might be accomplished and in order to prevent said decrees from working injustice and creating an inequitable advantage, is an ancillary proceeding, dependent upon the original action.

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609, at 633 and 634.
Campbell v. *Golden Cycle Mining Co.*, 141 Fed. 610, at 612.
Venner v. *Penn. Steel Co.*, 250 Fed. 292, at 296 and 297.
Dickey v. *Turner*, 49 Fed. (2d) 998, at 1000.

Any proceeding for the above purpose, whether it be a bill or petition or just a simple motion, is an ancillary proceeding.

Venner v. *Penn Steel Co., supra,* at 296 and 297.
Dickey v. *Turner, supra,* at 1000.

The receiver's motion is therefore not an original cause of action, but is dependent on and supplemental to the receivership and the respondent's petition to be allowed to sue. The District Court is administering the assets of The Stores in receivership, and as a part of this administration it gave the respondent permission to sue on the bond in question. This bond is in the possession of the Court and its obligation is in the Court's control. The receiver's motion was designed merely to further deal with the administration of this matter, to aid, regulate and control the liquidation of the receivership in order to effect the intention of the Court and prevent injustice and the working of an inequitable advantage. It merely seeks to modify a previous administrative order of the Court.

In such an ancillary proceeding the Court may proceed without actual service of the subpoena on the defendant if he lives outside the territorial jurisdiction of the Court. Service may be made upon his counsel in the original action and the Court may issue an injunction without actual personal service.

Dunn v. *Clarke,* 8 Pet. 1, at 2.
Minnesota Co. v. *St. Paul Co., supra,* at 633.
Leman, Adm., v. *Krentler-Arnold Hinge Last Co.,* 284 U.S. 448.
Crelin v. *Ely,* 13 Fed. 420, at 422.
Bartlett v. *Sultan of Turkey,* 19 Fed. 346.
Abraham v. *North German Fire Insurance Co.,* 37 Fed. 731.

All that is requisite is that the defendant in the ancillary matter should have notice of the institution of such proceeding, and service on his chosen attorney in the original proceeding is therefore proper. This practice existed before Equity Rule 13 was in effect and has never been understood to be affected thereby. The practical construction of this rule has always been not to extend it to subpoenas on ancillary proceedings.

The Cortes Co. v. *Thannhauser,* 9 Fed. 226.

The service of the order of notice on the receiver's motion was made on Mr. Horblit, counsel for the respondent in the original proceeding, and pursuant thereto the respondent appeared in the District Court on the return day. Certainly, then, in view of the above authorities and the fact that the respondent was represented in the proceeding, it cannot be said that the service on his attorney was in error.

The respondent has argued that this service was in error because the order of notice provided for service on "him" (Louis Raphael). Your petitioner contends on the other hand, that the service on Raphael's attorney complied with the order because the respondent was a resident of Connecticut.

Abraham v. *North German Fire Insurance Co., supra.*

As a matter of substance the respondent is not prejudiced or injured in any way by service on Mr. Horblit. Such service was in fact more nearly calculated to notify the respondent. If this Honorable Court, however, does not think that this service complied with the order of notice and thinks that this service is fatal to proper jurisdiction, your petitioner prays that the order of notice be amended to provide specifically for service on Mr. Horblit, the respondent's counsel.

Jurisdiction in this matter, however, is not dependent on the doctrine of ancillary proceedings and substituted service, for the general appearance of the respondent, Raphael, on the receiver's motion to amend, has subjected him to the jurisdiction of the District Court.

VIII.

Conclusion.

The District Court did not err in issuing the order of December 7, 1931 (R. 59-60), by which it modified its previous order of March 23, 1931, giving the respondent, Raphael, leave to sue on the bond, and by which it enjoined said Raphael from prosecuting the suit on the bond which he had instituted in the Massachusetts Court pursuant to said leave, except that he may proceed to judgment, but no further.

The decree of the Circuit Court of Appeals on December 7, 1931, reversing and remanding said order of the District Court, should be reversed.

Respectfully submitted,

WILLIAM P. EVERTS,
CARL F. SCHIPPER, JR.

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Supreme Court of the United States

October Term, 1932.

No. 407.

GEORGE B. MUNROE, Receiver,
Petitioner,

v.

LOUIS RAPHAEL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MARK M. HORBLIT,
BENJAMIN GOLDMAN,
Attorneys for Respondent.

LAWYERS BRIEF & PUBLISHING CO.
BOSTON, MASS.

SUBJECT INDEX.

PAGE

Statement of the Case 1

Points and Authorities 10

I. The State Court proceedings brought by the respondent against the principal and sureties, to enforce their obligation to him on the bond, was not an interference with a *res* in the possession of the receiver 10

A. The obligation sought to be enforced in the State Court proceedings was to pay direct to creditors, not to the receiver 10

II. The Bill in Equity in the State Court was a proceeding *in personam*, and the receiver was a total stranger to those proceedings and to the property of Drake and Buff which this respondent sought to reach and apply 14

III. The District Court was without jurisdiction to enjoin the proceedings in the State Court 18

IV. No question of preference is involved 27

TABLE OF CASES, STATUTES & TEXTBOOKS CITED.

Alexander v. Union Surety Co., 85 N. Y. S. 282; 11 A. B. R. 32 13

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263, F. 237 and 278, F. 832 ..... 25, 26

Carpenter v. Turrell, 100 Mass. 450 12

Central Union Trust Co. v. Anderson County, 268 U. S. 93, 45 S. Ct. 427 25

Chicago & Great Western Ry. v. Hulbert, 205 Fed. 248, 250 26

PAGE

Continental Trust Co. v. Toledo & C. Ry. Co., 82 Fed. 642 15
Cosmopolitan Trust Co. v. L. Agoos Tanning Co., 245 Mass. 69 28
Equitable Trust Co., *Ex parte*, 231 Fed. 571, 591..... 20
Gardner v. Gardner, 87 N. Y. 14 17
Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 12
Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43 20
Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337 ..... 20, 21
Howard v. United States, 184 U. S. 676; 22 S. Ct. 543 13
International Railway Co. v. Binford, 10 F. (2) 496; cert. denied, 273 U. S. 694, 47 S. Ct. 91 ..... 21, 24
Jackson v. Bunnell, 113 N. Y. 216 17
Julian v. Central Trust Co., 193 U. S. 93, 24 S. Ct. 399 19, 26
Kanter & Cohen, *In Re*, 121 Fed. 984..... 25
Kern v. Hendikoper, 103 U.S. 494 18
Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79.....19, 22
Lassiter v. Norfolk Ry. Co., 79 S. E. 264 (S. E.)..... 26
McBride v. Little, 115 Mass. 308 17
Magid v. Westmoreland, 15 F. (2) 884, aff. in 15 F. (2) 885 21
Marshall v. Holmes, 141 U. S. 589, 12 S. Ct. 62 19
Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278 13
Metcalf v. Barker, 187 U. S. 165; 23 S. Ct. 67 16
Musgrave v. Staylor, 36 Md. 123 17
Railroad v. Manton, 164 U. S. 636, 17 S. Ct. 216 26
2 Remington on Bankruptcy, 3rd. Ed. Sec. 1090, p. 441 13
Riehle v. Margolies, 279 U. S. 218, 49 S. Ct. 310..... 21
Rioux v. Cronin, 222 Mass. 131 16
Rubinstein v. Lottow, 223 Mass. 227 at 230 28
Snyder v. Smith, 185 Mass. 58 16

PAGE

Stewart v. Wisconsin Cent. Ry., 117 Fed. 782..... 26
Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th) 17
Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250 ..... 21, 25
U. S. *ex rel.* v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.) 13
U. S. Mortgage Co. v. Missouri Railway Co., 269 Fed. 497; cert. denied 41 S. Ct. 538, 256 U. S. 699 ... 15, 26
28 U. S. C. A. Sec. 379 18
U. S. F. & G. Co. v. Kenyon, 204 U. S. 349 27 S. Ct. 381.. 13
Wabash Rd. v. Adelbert College, 208 U. S. 38, 55, 28 S. Ct. 182, 186, 188 26
Western Union Co. v. U. S. Trust Co., 221 Fed. 545..20, 23

Supreme Court of the United States

October Term, 1932.

No. 407.

GEORGE B. MONROE, Receiver,
Petitioner,
vs.
LOUIS RAPHAEL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

On a bill in equity entitled "J. B. Hirshfield & Co., Inc., *et al.*, Plaintiffs v. Monroe Stores, Inc.," filed in the United States District Court for the District of Massachusetts on July 14, 1930 by three creditors of said Monroe Stores, Inc., the petitioner was, on July 23, 1930, appointed, by consent, receiver of the assets and property of said corporation (Rec. p. 2, pars. A, C, and D). On November 10, 1930 an order was entered, on a petition filed that day by the receiver, granting him authority "to advertise for sealed bids for all the assets and property of the defendant corporation, including cash on hand, merchandise, fixtures, good-will and all other assets." (Rec. p. 3, par. F.)

On November 25, 1930, one, Harold A. Dempsey filed an offer whereby, in consideration of the transfer to him of all the assets (Rec. pp. 12 to 15 incl.) he bound himself to pay to creditors of said Monroe Stores, Inc., thirty per cent of their respective claims "in or within thirty days after their claims have been duly approved and allowed" (Rec. p. 12, par. 1), and also to pay "any and all liabilities of the receiver [for merchandise, administration expenses, counsel fees, etc., not exceeding twenty thousand dollars ($20,000.00)] within thirty days after said claims against the receiver have been duly allowed by this court" (Rec. p. 13, par. 2). By said offer, said Dempsey also promised, among other things, to file in court within seven days after the acceptance thereof, "a bond in the penal sum of one hundred thousand dollars with good and sufficient sureties," (Rec. p. 14, par. 7). On November 26, 1930 said offer was accepted in pursuance to an order entered on that day, and thereafter, said Dempsey filed in said court a bond in the penal sum of one hundred thousand dollars, executed by him as principal and by Louis F. Buff and Clifford S. Drake as sureties (Rec. pp. 15 and 16).

By said bond, the principal and sureties bound themselves "unto the United States of America in the full and just sum of one hundred thousand dollars" for the purpose, therein recited, of "guaranteeing the performance" of the terms of said offer, said bond being upon the condition that "if the said Harold A. Dempsey shall comply with all the conditions and items of said offer, then this obligation to be void; otherwise to be and remain in full force and effect" (Rec. pp. 15 and 16). Said bond was approved by the court on December 2, 1930 after the respective sureties had filed affidavits (Rec. pp. 5 to 8 incl.) respectively itemizing their assets and stating the amount of their liabilities.

These affidavits show that the net worth of said Drake was "not less than $158,255.00" (Rec. p. 5) and that said Buff was "worth in good property not less than six hundred thousand dollars ($600,000.00) over and above all debts, liabilities, and lawful claims against me, and all liens, encumbrances and lawful claims against my property" (Rec. p. 8).

Upon the filing and approval of said bond, the receiver conveyed to Dempsey all the assets of Monroe Stores, Inc., including the cash on hand (Rec. p. 11, par. 6).

[This fact, as well as certain other facts hereinafter recited, are included by reference in paragraph H (Rec. p. 3) of the "Agreed Statement," which stipulates that "the statements concerning said offer and concerning the other proceedings set forth in the petition (appearing on pp. 9 to 16 incl. of the record), entitled 'Petition By Louis Raphael, A Creditor of Monroe Stores, Inc. For Leave To Institute Proceedings Upon Bond' — are true."

The court's attention is also respectfully directed to paragraph I of the "Agreed Statement" which stipulates that: "The statements set forth in the Plea of Louis Raphael (appearing on page 36 of the record) with respect to said proceedings in the Suffolk Superior Court in said case of United States of America, *ex rel.* Louis Raphael v. Dempsey, *et al.*, and with respect to the proceedings in said United States District Court in said case of J. B. Hirshfeld & Co., Inc., *et al.* v. Monroe Stores, Inc., are true."]

In pursuance to an order limiting the time within which persons holding claims against said Monroe Stores, Inc., might present their proofs of claim therefor, the respondent "duly presented" his proof of claim which was "duly approved and allowed" on February 9, 1931 in the sum of thirty-five thousand ($35,000.00) dollars (Rec. p. 10, par.

4). Dempsey, Drake and Buff "duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel." (Rec. p. 10, par. 4.) After the lapse of thirty days from the date of allowance of his said claim, the respondent, on March 12, 1931, "duly demanded" of said Dempsey, Drake and Buff, payment of thirty per cent of the amount thereof, to wit, $10,500.00 (Rec. pp. 10 and 11, par. 4). "Said Drake and Buff paid to said Raphael on account thereof the sum of twelve hundred dollars ($1200.-00), leaving an unpaid balance of ninety-three hundred ($9300.00) dollars" (Rec. pp. 36 and 37, par. 2).

As no payment was made on said balance, the respondent "communicated with said receiver" (Rec. p. 11, par. 4) and, "after conferring with said receiver and with his knowledge," (Rec. p. 37, par. 3), filed on March 23, 1931 in said District Court a petition (Rec. pp. 9 to 11 incl.) praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond" (Rec. p. 11). The prayer of said petition was duly allowed by said court on March 23, 1931 (Rec. p. 12) and accordingly, the respondent, as "relator", did, on April 9, 1931 bring in the Massachusetts Superior Court for the County of Suffolk, a bill in equity, in the name of the United States of America, as obligee of said bond, against said Dempsey, as the principal and against said Drake and Buff as sureties to enforce their obligation on said bond. Said bill sought to reach and apply, under Massachusetts G. L. chap. 214, sec. 3, certain shares of stock and other property of said Drake and Buff toward the payment of said balance of $9300.00 due the respondent on his said claim. Said bill was en-

titled "United States of America, *ex rel.* Louis Raphael vs. Harold A. Dempsey, *et als.*" (Rec. p. 3, par. I) and a summary of said Bill is set forth in the record (pp. 42 to 45). In the Superior Court proceedings, the respondent "obtained and now has attachments upon property of said defendants, Drake and Buff and injunctions restraining the transfer by them of certain property, to secure the payment of the amount justly due him" (Rec. p. 39, par. 9).

Said State court proceedings were referred to a master who heard the evidence and filed a report of his findings (Rec. pp. 42 to 52 incl.). It appears by the findings in that report that Dempsey "was merely a straw and nominee for the defendants, Buff and Drake, and had no financial interest other than he was acting for them to purchase the property" (Rec. p. 48, par. 9), and that Dempsey received from Buff and Drake a bond to indemnify him "against any liability or loss as the result of the offer and on the bond which the said Dempsey signed as principal in the United States District Court." (Rec. p. 49, par. 14.)

The master finds Buff to be the owner of a large number of shares of stock in various corporations, viz., Henrici Laundry Machinery Co., Babson Dow Mfg. Co., Buff & Buff Mfg. Co. and others (Rec. pp. 50 and 51, pars. 19, 21, 22 and 23). Drake was found by the master to be the owner of shares of stock in Mullins Mfg. Co. and W. E. Noyes Co. (Rec. p. 51, par. 25) and to be the beneficial owner of a number of parcels of land which stood of record in the names of various nominees of said Drake, seven in number, said Drake holding "in his possession, unrecorded deeds from the respective nominees to himself as grantee." (Rec. p. 51, pars. 26 and 27). Drake was also found to have deposits in three banks and to be the holder of various mort-

gages on real estate aggregating approximately $150,000.00 (Rec. pp. 51 and 52, par. 28).

The master's report further shows that after Dempsey had obtained from the receiver the assets of Monroe Stores, Inc., Drake and Buff caused to be organized a Delaware corporation known as "Monroe Stores Corporation" and that said Dempsey, at their direction, transferred all said assets to said new corporation (Rec. p. 49, par. 16). The master reports that Drake testified before him "that *the only reason* he had for not paying the balance due the plaintiff [Louis Raphael] was because he (Drake) has an agreement from the Monroe Stores Corporation to save him harmless." (Rec. p. 52, par. 31.)

After denying motions filed by Drake and Buff to recommit the master's report, the Superior Court, on October 20, 1931, entered a decree confirming said master's report (Rec. p. 38, par. 6). No appeal having been claimed from said last mentioned decree, and the time for claiming an appeal having elapsed, your respondent filed in the Superior Court, on November 13, 1931, a motion for the entry of a final decree on said master's report, and submitted therewith for the consideration of the court a proposed form of final decree (Rec. pp. 31 to 34) "calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him." (Rec. p. 38, par. 7.) After the filing of said motion for final decree, counsel for this respondent was served with a copy of the restraining order issued by the United States District Court (Rec. pp. 34 and 35).

It appears that subsequently to the commencement by the respondent of said equity proceedings in the State court,

the receiver filed in the original receivership proceedings in said United States District Court an "ancillary bill of complaint" against said Dempsey, Buff and Drake (Rec. pp. 16 to 20). Said ancillary bill recited said offer of Dempsey, and the filing of said bond and then alleged: "there is due from said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors* who have filed their claims, and which claims have been allowed by this court, a total balance of $34,856.14" (Rec. p. 17, par. 4).

On this ancillary bill of complaint, the United States District Court, on May 4, 1931, issued a temporary injunction against Dempsey, Drake and Buff, restraining them, "*until the further order of the court*" from transferring or encumbering their property or withdrawing funds from any banks (Rec. pp. 21 and 22). On July 16, 1931, a final decree on said ancillary bill was entered by consent of the parties thereto, which ordered that "judgment for the plaintiff in the sum of $33,026.83, together with costs be entered against the defendants, Clifford S. Drake, Louis F. Buff and Harold A. Dempsey, jointly and severally, and that execution issue forthwith" (Rec. p. 23). The final decree did not provide for the continuance of the temporary injunctions, but disposed of the ancillary bill of complaint by the order for the entry of said judgment and execution.

It appears by the stipulation in the record that this respondent (Raphael) "was not made a party to said ancillary bill of complaint—and that he has never taken any part in any hearings thereon" (Rec. p. 40, par. 12). It also appears by the record that the receiver was not a party to the State court proceedings (Rec. p. 37, par. 4), but that he knew of the State court proceedings, for the receiver and

one of his attorneys were called by this respondent as witnesses before the master appointed by the Superior Court (Rec. pp. 37 and 38, par. 5).

On October 7, 1931, the receiver filed in the United States District Court a petition against Buff and Drake to adjudge them in contempt for failure to pay the judgment entered upon said ancillary bill of complaint (Rec. pp. 23 to 28 incl.). The receiver alleged in said contempt petition that Buff and Drake "are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment" (Rec. p. 26, par. 15). No evidence was heard on said contempt petition, and, with the consent of the receiver, an order was entered requiring Buff and Drake to pay one thousand dollars ($1,000.00) per month, until the execution is satisfied (Rec. p. 29).

It appears by the record that this respondent (Raphael) was not a party to said contempt petition, received no notice of any proposed hearings or proceedings thereon and "has never taken part in any hearings" thereon (Rec. p. 40, par. 12).

On November 27, 1931, the receiver filed in the United States District Court in said original case of "J. B. Hirshfield, Inc., *et al.*, vs. The Monroe Stores, Inc., No. 2392 Eq.", a motion to modify the order which had been entered therein on March 23, 1931, authorizing this respondent to enforce the obligation of the bond in the name of the United States of America for his benefit. Said motion also prayed for an injunction against this respondent to restrain him from further prosecuting said State court proceedings "except

insofar as to reduce his claim to judgment" (Rec. pp. 30 and 31). On the return day of the order of notice issued on said motion, to wit, on December 3, 1931, this respondent appeared specially in the United States District Court by counsel and filed a plea to said motion (Rec. pp. 36 to 41). After a hearing on said motion and plea, a stenographic transcript of which appears in the record (Rec. pp. 54 to 63), the District Court, on December 7, 1931, entered an order modifying the order of March 23, 1931, and enjoining this respondent from further prosecuting his suit in the Superior Court "except that the said Louis Raphael may proceed in said cause to judgment, but no further" (Rec. pp. 63 and 64). The stenographic record shows that no evidence was offered by the receiver in support of his motion and that there was before the court no evidence other than said sworn plea (and the documents thereto annexed), the allegations of which plea, with respect to all the proceedings both in the State court and in the Federal court, are stipulated by the parties to be true (Rec. p. 4, par. I).

This order of December 7, 1931, was reversed on appeal by the United States Circuit Court of Appeals for the First Circuit in pursuance to an opinion of that court entered on June 27, 1932 (Rec. pp. 71 to 79 incl). From this reversal the petitioner seeks the writ of certiorari in this court.

Points and Authorities.

I. The State court proceedings brought by the respondent against the principal and sureties, to enforce their obligation to him on the bond, was not an interference with a res in the possession of the receiver.

A. The Obligation Sought to be Enforced in the State Court Proceedings was to Pay Direct to Creditors, Not to the Receiver.

The receiver was not the obligee of the bond, and it is clear that the obligation to pay the thirty per cent runs direct from Dempsey to the creditors. The receiver himself has admitted this. In his ancillary bill, he did not ask that the amounts due creditors be paid to him, but prayed that such sum be paid to the clerk of the United States District Court for the use and benefit of the creditors (Rec. p. 20, par. 2).

Again in the contempt petition, the receiver said expressly: ". . . said offer, in substance, provided that Harold A. Dempsey would *pay to the creditors* of the Monroe Stores, Inc. thirty per cent of the claims approved and allowed by this court." (Rec. p. 24, par. 3.) After referring to the bond as having been given to secure the performance of said obligation to "*pay to the creditors,*" the contempt petition alleges as the breach of said obligation, the failure "*to pay to the creditors* of The Monroe Stores, Inc. thirty per cent of the amount of their claims" (Rec. p. 25, par. 9).

The District Court recognized this direct obligation to the creditors when, on March 23, 1931, it granted this re-

spondent's petition for leave to institute proceedings thereon (Rec. pp. 9 to 12). In the very order which the Circuit Court of Appeals reversed, the District Court expressly recognized this direct obligation for the order stated that this respondent "may proceed in said cause to judgment." (Rec. p. 64.)

Moreover, Drake and Buff recognized their obligation direct to Raphael, when they made the payment of twelve hundred dollars ($1200.00) on account direct to him and not to, or through, the receiver. (Rec. pp. 36 and 37, par. No. 2.)

That the enforcement by Raphael of this direct obligation to pay assumed by Dempsey, Drake and Buff was not an interference with any *res* held by the receiver is well shown by the Circuit Court of Appeals in its decision as follows:

> "It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price (the 30 per cent of the claims of the creditors). In that case the receiver would have been entitled to receive the money from Dempsey or sue on the bond with the duty of paying out as assets of the estate such funds as he might receive and the District Court would have had exclusive jurisdiction to direct such proceedings. But that is not the situation here. The assets of The Stores were delivered to Dempsey on his promise to pay the creditors 30 per cent of their claims, and the liabilities and expenses of the receiver. To protect the creditors a bond was required and given running to the United States of America conditioned on the fulfilment of Dempsey's promise to pay the creditors. . . . All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser

rather than to the receiver for the payment of the dividends on their claims, all that remained for that court to do was to allow the claims of the creditors and settle the account of the receiver. There was no *res* in the custody of the District Court and there were no matters left over requiring judicial action of that court in relation to the receivership property or to any rights litigated in the receivership proceedings making necessary any further orders or decrees to establish the rights of the parties therein, which were or could be interfered with by the suit in the state court. The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one *in personam* against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores." (Rec. pp. 75 and 76.)

The same principle has been applied in suits to enforce the obligation on bonds to dissolve attachments.

Carpenter v. Turrell, 100 Mass. 450.
Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 at 326.

Carpenter v. Turrell, ubi supra, was a case involving a bond to dissolve an attachment. In that case, Wells, J., says at p. 452,

> "The plaintiffs contend that the bond is a mere substitute for the attachment, and therefore that it should stand in all respects as its precise equivalent. But such is not the purpose of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment; it dissolves the attachment. It is, in many respects, a higher and better security for the creditor than the attachment. . . . The bond, although a substitute for the attachment, is not its equivalent, and has not its incidents."

The receiver contends that in the case at bar the United States was somehow the real party in interest and he gives this contention as a reason for his assertion that suit could be brought on the bond only by him as receiver. As a basis for this contention, he cites *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349, 27 S. Ct. 381. In that case the United States had received a bond from a contractor under a contract made direct with the government for the construction of a public building. The United States was a party to the contract and was, of course, vitally interested in its performance. There "the United States had an interest in the bond and was a real party plaintiff," as the Circuit Court of Appeals says in its decision. In the case at bar, on the other hand, the United States Government, as such, had no interest in the Monroe Stores, Inc. or in its creditors. If Dempsey's bond had named some other obligee, the government could not have complained. The distinction between the two cases seems too clear to require further comment.

The view taken by the Circuit Court of Appeals is well supported by the authorities.

Howard v. U. S., 184 U. S. 676; 22 S. Ct. 543.
Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278.
Alexander v. Union Surety Co., 85 N. Y. S. 282; 11 A. B. R. 32.
U. S. ex rel. v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.).
2 Remington on Bankruptcy, 3rd ed., sec. 1090, p. 441.

In *Maryland v. Baldwin, ubi supra,* the United States Supreme Court had before it a case of a suit to enforce the obligation of an administrator's bond given by the admin-

istrator to the state of Maryland. In an opinion written by Field, J., the court says at p. 278:

> ". . . The state is only a formal plaintiff, the actual litigation being between the other parties. By the law of Maryland, the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

II. The bill in equity in the State court was a proceeding in personam, and the receiver was a total stranger to those proceedings and to the property of Drake and Buff which this respondent sought to reach and apply.

The suit instituted in the State court was *in personam* —to enforce the personal obligation of the principal and sureties. It did not seek to reach any property held by or conveyed by the receiver. It merely sought to enforce and satisfy the direct obligation of the sureties to a creditor by reaching and applying property owned by the sureties personally.

The receiver was not a party to the State court proceedings. In fact, the record shows that by the conveyance to Dempsey he had parted with all the assets which came into his hands as receiver of Monroe Stores, Inc. He owed no further duties to the creditors,—they were to look to the obligation under the bond for their dividends. The only reason why he was not discharged as receiver was that his fees and receivership obligations remained to be paid, and these were to be paid, not out of any fund in his hands, but by Dempsey (Rec. p. 13, par. 2). It is to this extent

only that the receiver has any interest in enforcing the bond.

There was no contractual relation between the receiver and Raphael, and the receiver was never requested, either expressly or impliedly, to represent Raphael's claim in any way. On the contrary, the receiver knew, before he began his ancillary bill, that Raphael had himself instituted proceedings seeking to enforce the obligation on the bond for his benefit (Rec. p. 37, par. 3).

In *U. S. Mortgage Co. v. Missouri Railway Co.*, 269 Fed. 497, the Circuit Court of Appeals says at p. 501,

> "Where an attempt is made to take property out of his (receiver's) possession, then he is a proper party to litigation, and where relief is sought against 'his acts' as such receiver he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. *Continental Trust Co. v. Toledo & C. Ry. Co.*, 82 Fed. 642, 646.
> "The receiver does not represent the justiciable rights of the parties to the litigation of which he is the receiver, but only the protection of the property in his hands as such, or the collection of that to the possession of which as receiver, he is entitled."

The receiver cannot, and does not, even so much as claim any title or interest in the shares of stock, the mortgages, and real estate belonging to Drake and Buff personally which Raphael seeks to have reached and applied in the State court proceedings. It is clear that the receiver has no interest, legal or equitable, in that property.

Raphael commenced the State court proceedings, with the consent of the United States District Court, and the record shows that those proceedings involved much effort, and consequent expense to this respondent. He obtained attachments on certain property of Drake and Buff and preliminary injunctions restraining the transfer of certain shares of stock belonging to them. It is clear that those preliminary injunctions issued by the State court gave to Raphael equitable liens with respect to those shares of stock, just as the attachments created legal liens on the property attached.

Snyder v. Smith, 185 Mass. 58.
Rioux v. Cronin, 222 Mass. 131.
Metcalf v. Barker, 187 U. S. 165; 23 S. Ct. 67.

In *Rioux v. Cronin, ubi supra*, Rugg, C. J., says at p. 137:

> "The filing of such a bill under the statute, (a bill to reach and apply) accompanied by the issuance of an injunction, does create a lien in favor of the creditor."

The order of the District Court was rightly reversed, for it deprived this respondent of said legal and equitable liens on the property of Drake and Buff, obtained by him in proceedings brought in accordance with the permission granted him by the U. S. District Court. (Rec. p. 12.)

On the other hand, the receiver did not even have a lien of any kind on any of the property of Drake and Buff which this respondent sought to reach, for it is to be noted that the temporary injunctions (Rec. p. 21) issued by the District Court on the ancillary bill of complaint, were not continued. The final decree entered on the ancillary bill,

with the receiver's consent, merely ordered a personal judgment and execution (Rec. p. 23). The temporary injunctions of the Federal court against Drake and Buff were thus dissolved by its own final decree, leaving the receiver with no semblance of a claim for an equitable lien on Drake's and Buff's property.

Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th).
Musgrave v. Staylor, 36 Md. 123.
Jackson v. Bunnell, 113 N. Y. 216.
Gardner v. Gardner, 87 N. Y. 14.

In *Sweeney v. Hanley, ubi supra*, the United States Circuit Court of Appeals for the ninth circuit says at p. 99, that the temporary injunction issued in that case had "come to an end by the entry of the final decree in the cause making no provision for any injunction."

It is true that the receiver had a right to enforce the bond for the payment of his administration expenses, counsel fees, etc., under a separate and distinct paragraph of the offer (Rec. p. 13, par. 2). But in so doing he stood no better, with respect to reaching property of Drake or Buff, than any other creditor of theirs.

In *McBride v. Little*, 115 Mass. 308, the court says at p. 309:

> ". . . The mere fact that a judgment in a suit brought against a debtor will lessen his ability to pay his other debts, does not create in his other creditors such a legal interest as entitles them to be heard upon the questions involved in the suit or to enjoin its prosecution."

It is thus clear that this receiver is a mere stranger to the respondent, without any title or right in the property

of Drake and Buff which was sought to be reached and applied in the State court and without any rights of action against this respondent and that the receiver had no standing to entitle him to an injunction to restrain proceedings in a State court against third parties.

III. The District Court was without jurisdiction to enjoin the proceedings in the State court.

Even aside from the receiver's lack of any standing or right to entitle him to any relief as against this respondent, the District Court was without jurisdiction to issue any injunction against the respondent.

28 U. S. C. A., sec. 379, provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This clearly shows the intent of Congress to prevent injunctions by Federal courts for the stay of proceedings in State courts, except where bankruptcy proceedings are involved. Under general principles of jurisdiction and comity of courts, three apparent exceptions have been recognized to the fiat of Congress above referred to. These are:

a. Where a cause has been removed from the State court to the Federal court, the latter can enjoin any other proceedings in a State court for the same cause.

Kern v. Hendikoper, 103 U. S. 494.

b. The Federal court has jurisdiction in equity to restrain the enforcement of a State court judgment where the latter has been obtained by fraud, etc., under general equity powers.

Marshal v. Holmes, 141 U. S. 589, 12 S. Ct. 62.

c. The Federal court can enjoin proceedings in a State court where the latter proceedings will interfere with the possession of property in the custody of a Federal court or officer or where the title to property already passed upon by the Federal court will be relitigated in the State court.

Julian v. Central Trust Co., 193 U. S. 93, 24 S. Ct. 399.

Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79.

B. But where the suit in the State court is merely one *in personam* the Federal court cannot enjoin the State court proceedings.

Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79.

In that case the Supreme Court held by Sutherland, J., at p. 229:

> "It is settled that where a Federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal court. Where the action is *in rem*, the effect is to draw to the Federal court the possession or control, actual or potential, of the *res*, and the exercise by the State court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court already attached * * *

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

The question then arises what is a proceeding *in personam*. The answer can best be found by an examination of the cases which have passed upon the exact situation as in the case at bar. From these cases the rule may be stated as follows:

Where a purchaser at a receiver's sale agrees as part of the purchase price to assume and pay the debts of the insolvent corporation, an action brought by a creditor of the corporation against the purchaser in the State court upon that promise to pay is a suit *in personam* and cannot be enjoined by the Federal court in which the receivership is pending, because such an action involves no lien upon, title, or interest in the specific property in the dominion of the Federal court and does not interfere with the disposition thereof by its decree.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43.

Western Union Co. v. U. S. Trust Co., 221 Fed. 545.

Ex parte Equitable Trust Co., 231 Fed. 571, 591.

International Ry. Co. v. Binford, 10 F. (2) 496. Cert. denied, 273 U. S. 694, 47 S. Ct. 91.

Magid v. Westmoreland, 15 F. (2) 884, aff. in 15 F. (2) 885.

Richle v. Margolies, 279 U. S. 218, 49 S. Ct. 310.

Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

In *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, the Guardian Trust Co. was a creditor of the Kansas City Suburban Belt Railroad Co. A receiver was appointed by the Federal court upon a proceeding to foreclose a mortgage on that railroad. Upon the sale a reorganization committee purchased the railroad and turned it over to a new corporation called the Kansas City Southern Railway Co. The decree of foreclosure contained the usual provisions that the purchaser should pay the cost of foreclosure, the receiver's liabilities and such claims as should be adjudged "prior in lien or superior in equity to the mortgage foreclosed herein upon the property sold." Thereafter, the Trust Co. brought suits at law in the State court of Missouri claiming personal judgments against the Southern Railway Co. on the ground that the latter had assumed and agreed to pay the debts of the Kansas City Suburban Belt Rd. Co. but not because the debts were "prior in lien or superior in equity to the mortgage." Thereupon the Southern Railway Co., by an ancillary bill in the Federal receivership proceeding, obtained an injunction in that court prohibiting the Trust Co. from prosecuting the suits in the State court. The Trust Co. appealed. The Circuit Court of Appeals speaking by Sanborn, J., reversed the order for the injunction and says, at p. 341:

> "* * * The actions at law are founded upon no lien and upon no claim of lien upon any of the property mortgaged and sold under the decree of the court be-

low. They rest upon the single claim that the Southern Company has both impliedly and expressly promised to pay the claims which they disclose to the trust company and the only relief which the latter seeks in them is a general judgment that it may recover the amount of these claims from the Southern Company. How, then, can these actions in any way invade the exclusive jurisdiction, or impeach the decree of the court below or the title of the Southern Company thereunder. * * *

(At p. 342) * * * * "The actions at law here under consideration are against the purchaser, and they rest upon its independent liability, not upon that of the mortgagor, and the lien of the levies under the judgments, if any, should be rendered therein, will be neither prior in right nor superior in equity to the lien of the mortgage, but will be effective only because the debtor, the Southern Company, has acquired the title to the property and has thereby made it liable for its personal obligations. When a judgment debtor takes title to property which he buys at a foreclosure sale or otherwise, the judgment against him immediately settles upon it. When a debtor buys such property it becomes liable to be seized under any judgment that may be subsequently rendered against him.

(At p. 343) * * * * "Our conclusion is that the order for a temporary injunction herein was improvidently granted because an action for a personal judgment against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was incorporated and under which it bought the property is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage nor an impeachment of the decree or of the title thereunder."

This case has been cited with approval in

Kline v. Burke, 260 U. S. 226, 43 S. Ct. 79.

In *Western Union Tel. Co. v. U. S. & M. T. Co., et al.*, 221 Fed. 545, the Western Union Co. was a creditor of the Kansas City, Mexico & Orient Railway Co. A receiver was appointed by the Federal court upon a proceeding to foreclose a mortgage on that railway. After the sale the Western Union and other creditors brought suit in the State court of Kansas against the purchaser at the foreclosure sale charging that the purchase was not made in good faith and praying that the purchasing company be restrained from issuing certain stocks and bonds. The Federal court enjoined such suits in the State court and the Western Union appealed. The Circuit Court of Appeals, in reversing the order for the injunction, says at p. 549:

> "A purchase through a foreclosure sale, or otherwise of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent company, whereby the stockholders thereof derive, by receipt of stock or bonds of the new company, or otherwise, benefits equal to or greater than those received by, or openly offered to and rejected by, its general creditors, is fraudulent in law as to the latter, and renders the new corporation and the property it purchased at such sale liable for the claims of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old company in excess of the value of the interest secured by, or openly offered to and rejected by, the unsecured creditors. * * *
>
> At p. 555 * * * * "The prosecution or threatened prosecution in other courts by creditors of a mortgagor of actions *in personam* against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under him, upon alleged promises or legal liabilities made or incurred by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, title, or interest in the specific prop-

> erty in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree."

Another case bearing strongly on the case at bar is *International-Great Northern Rd. Co. v. Binford, ubi supra.* There the International and Great Northern Rd. Co. had gone into the hands of an equity receiver appointed by the United States District Court, and its property was sold by the receiver under a foreclosure decree to a new corporation organized for that purpose. The decree of sale provided that the property was sold subject to claims prior in equity to the mortgage. Thereafter the Concrete Company, a creditor of the old railroad company, whose claim accrued for current expenses of operation within two years of the receivership, sued the purchaser in the Texas State court, on the ground that the purchaser was charged with the payment of the debts of the old company and on the ground that a fraud had been practiced by the purchaser, in that stockholders of the old company received benefits from the organization of the new company and from the purchase by it, whereas no provision was made for claims such as this creditor held. That suit, in the Texas court, resulted in a judgment for the creditor. Thereupon the purchasing corporation, (or rather its successor) brought a bill in the United States District Court to enjoin the sheriff from enforcing the judgment. The District Court denied the prayer for injunction. In affirming this denial, the United States Circuit Court of Appeals for the Fifth Circuit said at p. 498:

> "Evidently the purpose of the quoted reservations was to prevent the sale of the property from affecting the court's power to subject it to claims which would have been enforceable against it by the court if it had remained in the court's custody * * * * * The suit brought by the Concrete Company did not assert a

claim that the debts it held were chargeable against the property sold under the above-mentioned decree when title to that property was acquired by the purchaser at such sale * * * * * The other claim asserted in the suit brought by the Concrete Company likewise was based on alleged transactions subsequent to the acquisition of title to the property by the purchaser at the sale under the court's decree. In our opinion that suit did not involve controversies which were ancillary and dependent on the receivership and foreclosure suit. The rule as to the ancillary jurisdiction of a court to deal with claims in respect of property there impounded was stated and applied in the case of *Central Union Trust Co. v. Anderson County*, 268 U. S. 93, 45 S. Ct. 427. The statement of the jurisdiction by no means indicates that it has such a scope as to enable a court to draw to itself the determination of any claim of an interest in or a charge upon property impounded which did not come into existence until after the court surrendered custody and control and after the owner through the sale of the property under the court's decree was free to subject it to liability * * * * * The claims sought to be brought before the court for adjudication by the proceeding instituted by the appellants were not within the ancillary jurisdiction which was invoked, as they did not accrue until after the sale under the court's decree of the property affected by them."

C. Cases of very similar nature in which it was held that a Federal court could not restrain State court proceedings *in personam* against the purchaser from the Federal receiver and in which the distinction between suits *in personam* and suits *in rem* is drawn are:

Texas v. P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263 F. 237 and 278 F. 832.

In re Kantor & Cohen, 121 Fed. 984.

U. S. Mort. Co. v. Mo. Ry. Co., 269 Fed. 497; cert. denied 41 S. Ct. 538, 256 U. S. 699.
Lassiter v. Norfolk Ry. Co., 79 S. E. 264 (S. E.).
Railroad v. Manton 164 U. S. 636, 17 S. Ct. 216.

D. Cases in which the Federal court have enjoined State court proceedings against the purchaser from a Federal receiver are expressly based upon three necessary requisites, namely,

1. That the decree of sale reserves to the Federal court the power to determine all matters relating to the purchaser's rights and liabilities.

2. That the decree of sale reserves to the Federal court the power to retake and resell the property if the purchaser does not carry out his agreement.

3. That the State court proceedings will affect the specific property that was transferred to the purchaser.

Wabash Rd. v. Adelbert College, 208 U. S. 38, 55, 28 S. Ct. 182, 186, 188.
Julian v. Central Trust Co., 193 U. S. 93, 24 S. Ct. 399.
Stewart v. Wisconsin Cent. Ry. 117 Fed. 782.

Where no one of the three requisites is present the injunction will always be refused.

Chicago Great Western Ry. v. Hulbert, 205 Fed. 248, 250.
Am. Brake Shoe Co. v. Pere Marquette Ry. Co., 263 Fed. 237.

It is therefore respectfully submitted that the Circuit Court of Appeals was clearly right in holding that the District Court had no jurisdiction to restrain this respondent from prosecuting the State court proceedings.

IV. No question of preference is involved.

According to the affidavits filed by Drake and Buff when they became sureties on the bond, their aggregate net worth was in excess of three-quarters of a million dollars (Rec. pp. 5 to 8). The master, in the State court proceedings, found them to be possessed of substantial amounts of property (Rec. pp. 50, 51 and 52). As late as October 7, 1931, the receiver himself alleged that "said Louis F. Buff and Clifford S. Drake are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment in this cause." (Rec. p. 26.) This was only about seven weeks before November 27, 1931, the date of the filing of the receiver's motion to restrain the State court proceedings (Rec. p. 30). There is no allegation and no evidence that Drake and Buff are insolvent and certainly they are not in bankruptcy, nor are their assets in the hands of a receiver of the Federal court.

No question of unlawful preference by one creditor over another can be involved in the absence of bankruptcy. It is clearly established that where, by a payment by a debtor to one creditor "a preference of one creditor over another is thereby produced," that is nothing unlawful at common law. "There are no classes of creditors at common law outside the bankruptcy act."

Rubenstein v. Lottow, 223 Mass. 227 at 230, per Rugg, C. J.

Cosmopolitan Trust Co. v. L. Agoos Tanning Co., 245 Mass. 69.

The receiver's contentions as to preference are, therefore, untenable.

It is therefore respectfully submitted that no novel question is involved in the decision of the Circuit Court of Appeals; that the decision is based on principles well established by the authorities and that the petition for writ of certiorari should be denied.

Respectfully submitted,

MARK M. HORBLIT,
BENJAMIN GOLDMAN,
Attorneys for Respondent,
Louis Raphael.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 407

GEORGE B. MONROE, RECEIVER, PETITIONER,

vs.

LOUIS RAPHAEL, RESPONDENT.

BRIEF IN BEHALF OF LOUIS RAPHAEL, RESPONDENT.

MARK M. HORBLIT,
BENJAMIN GOLDMAN,
MAURICE H. HORBLIT,
Attorneys for the Respondent,
Louis Raphael.

INDEX OF BRIEF.

STATEMENT OF THE CASE.

PAGE

A. The Proceedings in the District Court concerning Monroe Stores, Inc. 2
   1. The Receivership, by Consent of Monroe Stores, Inc. 3
   2. Dempsey's Offer 3
   3. Dempsey's Bond and the "Good and Sufficient Sureties" 5
   4. The District Court authorizes Raphael to Sue on the Bond 7

B. The Suit on the Bond Brought by this Respondent as "Relator" against Dempsey, Drake and Buff in the Massachusetts Superior Court 8
   1. The Respondent Obtained, in the State Court Proceedings, liens by Attachment and Injunction on Property of Drake and Buff 8
   2. The Motion to Dismiss..... 9
   3. The Master's Report 10
   4. Confirmation of The Master's Report and the Respondent's Motion for a Final Decree thereon 12
   5. The Federal Court's Order of Notice Suddenly Interrupts the State Court Proceedings 13

C. The Proceedings Brought in the Federal Court against Drake and Buff, After the Respondent's State Court Suit Had Been Instituted, Did not Reach or Apply Their Property..... 14
   1. The "Ancillary Bill" in the Federal Court and the Disposition Thereof By a Consent

PAGE

Decree Providing for a Mere Unsecured Judgment 14

2. The Petition for Contempt Filed By the Receiver, and the Disposition Thereof By a Consent Decree Allowing Drake and Buff to Pay The Judgment in instalments Over a Period of More Than Three Years..... 16

D. The Proceedings in the District Court on the Return of the Order of Notice Issued on the Receiver's Motion to Enjoin the State Court Suit..... 17

POINTS AND AUTHORITIES

I. The Suit Pending in the State Court is Against Dempsey, Drake and Buff *in Personam* and the Federal Court was Without Jurisdiction to Enjoin It 19

II. The Federal Court Injunction Restraining This Respondent From Attempting to Enforce the Liens Obtained by Him in the State Court Suit Cannot be Justified on the Ground that He Might Thereby Obtain a Preference..... 27

A. The Record Shows that Drake and Buff are Solvent 28

B. The Assertions in the Receiver's Brief as to the Insolvency of Drake and Buff are Unwarranted by the Record..... 30

C. No Question of Preference is Involved in the Absence of Bankruptcy..... 33

III. The Injunction Restraining the Respondent from Enforcing the State Court Attachments cannot be Justified on the Ground that the Receiver had any Legal Right or Interest in the Property Attached, for the Receiver Never Had Possession of any of the Attached Property; nor Did the State Court

PAGE

Attachments Interfere with any Federal Court Lien or Attachment thereon..... 35

IV. The State Court Attachments Did Not Interfere with "The Administration and Liquidation" of Any Property in the Possession of the Receiver, for He Had Conveyed to Dempsey All the Property of Monroe Stores, Inc., and Thereafter Had No Property in His Possession. The Bond was Neither in His Possession nor was he named as Obligee Thereof 39

V. The United States of America Had No Beneficial Interest in the Bond, It was Only a Formal Obligee Therein. Those Entitled to the Benefits Secured or "Guaranteed" by the Bond are the Real Parties in Interest and are Entitled to Enforce It. 41

A. The District Court Has Recognized the Obligation of Dempsey to make Payment Directly to the Creditors..... 43

B. Dempsey, Drake and Buff Have Themselves Acknowledged Their Obligation to make Payment Directly to the Creditors..... 43

C. The Receiver himself Has Recognized That Dempsey was Obligated to the Creditors to Make Payments Directly to them..... 44

VI. As the Respondent's Suit was merely to Enforce an Obligation under the Bond, and as it Did not Interfere with the District Court's Physical Possession of the Paper Evidencing this Obligation, and as the Receiver is a Stranger to the State Court Suit, He Has No Standing to Raise the Point as to Whether the Respondent Had the Legal Right or Capacity to Institute a Suit Thereon against Drake and Buff. If there were Merit

PAGE

to that Point, it was Open to Drake and Buff in Their Defense to the State Court Suit, but they did not Raise it 50

VII. The Receiver is Merely in the Position of Any Other Creditor of Drake and Buff. As such creditor, the Receiver is Not Entitled to Enjoin Suits against Buff and Drake by other Creditors 53

VIII. The District Court could Not Revoke the Leave to Sue 56

IX. The Order Appealed from is Erroneous Under the Equitable Principles of Laches and Estoppel. 59

X. No Evidence was Introduced at the Hearing on the Receiver's "Motion" to Warrant the Injunction 62

XI. The Injunction was Unwarranted Because the District Court Lacked Jurisdiction over the Respondent 64

Conclusion 66

TABLE OF CASES CITED.

Alexander v. Union Surety Co., 85 N. Y. S. 282; 11 A. B. R. 32 ..... 46, 47

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263, F. 237 and 278, F. 832 22

Banfield v. Whipple, 14 Allen 13 33

Behne v. Anchor Insurance Co., 297 Fed. 986 at 989, C. C. A. 2nd 64

Broitman v. Silver, 1932 Mass. Adv. Sh. 535 61

Baltimore & Ohio Ry. Co. v. Wabash Rd. Co., 119 Fed. 678 (C. C. A.) 21

Carpenter v. Turrell, 100 Mass. 450 ..... 51, 52

PAGE

Central Union Trust Co. v. Anderson County, 268 U. S. 93, 45 S. Ct. 427 26
Continental Trust Co. v. Toledo Ry. Co., 82 Fed. 642 ..... 52, 66
Cosmopolitan Trust Co. v. L. Agoos Tanning Co., 245 Mass. 69 ..... 33, 34
Covell v. Hyman, 111 U. S. 176, 4 S. Ct. 355..... 37
Dietzsch v. Huidekoper, 103 U. S. 494 51
Estes v. Gunter, 122 U. S. 450; 7 S. Ct. 1275 33
Equitable Trust Co., *Ex parte*, 231 Fed. 571, 591... 22
Flexner v. Farson, 248 U. S. 289, 39 S. Ct. 97..... 65
Gardner v. Gardner, 87 N. Y. 14 ..... 37, 38
General Inv. Co. v. Lake Shore Ry., 260 U. S. 261; 43 S. Ct. 106 at 117 64
Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 51
Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43 22
Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337 ..... 22, 23
Halsey v. Fairbanks, 4 Mason 206 ..... 33, 34
Howard v. United States, 184 U. S. 676..... 19
Illinois Surety Co. v. U. S., 226 Fed. 665 ..... 41, 49
International Railway Co. v. Binford, 10 F. (2) 496; cert. denied, 273 U. S. 694, 47 S. Ct. 91... 22, 25
Jackson v. Bunnell, 113 N. Y. 216..... 37
Kanter & Cohen, *In Re*, 121 Fed. 984..... 22
Kimball v. Sweet, 170 Mass. 538, 539 65
Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79..... 21, 24, 36
Lassiter v. Norfolk Ry. Co., 79 S. E. 264..... 23
McBride v. Little, 115 Mass. 308 55
McGoldrick v. Slevin, 42 Ind. 522 55
McLearn v. Hill, 1931 Mass. Adv. Sheets p. 1791.. 61
Magid v. Westmoreland, 15 F. (2) 884, aff. in 15 F. (2) 885 22

PAGE

Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278.... 46, 47
Marberry v. Brooks, 7 Wheat. 575 33
Metcalf v. Barker, 187 U. S. 165; 23 S. Ct. 67..... 36
Musgrave v. Staylor, 36 Md. 123 37
Nottebaum v. Leckie, 31 Fed. (2) 556, at 560 (C. C. A.) 64
Railroad v. Manton, 164 U. S. 636, 17 S. Ct. 216... 22
Riehle v. Margolies, 279 U. S. 218, 49 S. Ct. 310.... 20, 21
Rioux v. Cronin, 222 Mass. 131 36
Snyder v. Smith, 185 Mass. 58 36
Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th) 37
Sweetsir v. Chandler, 98 Me. 145 at 151 50
Smith v. Scott, 86 Ind. 346 51
Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250 22
U. S. *ex rel.* v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.) 46
U. S. Mortgage Co. v. Missouri Railway Co., 269 Fed. 497; cert. denied 41 S. Ct. 538, 256 U. S. 699.... 23, 52
U. S. F. & G. Co. v. Kenyon, 204 U. S. 349, 27 S. Ct. 381 .....19, 41, 47, 48, 49
United Drug Co. v. Cordley and Hayes, 239 Mass. 334 65
U. S. v. River Rouge, 269 U. S. 411, 46 S. Ct. 144.. 58
Victor v. Lewis, 53 N. Y. S. 944 55
Western Union Co. v. U. S. Trust Co., 221 Fed. 545.. 22, 25
W. E. Stewart Land Co. v. Arthur, 267 Fed. 184 (C. C. A.) 21
Ward v. Kent, 6 Lea (Tenn.) 128 51
cf. Young Co. v. McNeal Edwards Co., 283 U. S. 398, 51 S. Ct. 538 65

TABLE OF STATUTES AND TEXTBOOKS CITED.

	PAGE
Clayton Act, 28 U. S. C. A. § 381	64
Judicial Code, Sec. 24	19
Judicial Code, Sec. 265 (28 U. S. C. A. sec. 379)	20
Massachusetts General Laws, c. 214, § 3	8
Massachusetts General Laws, c. 227, §§ 2, 3	65
28 U. S. C. A., Sec. 379	20
U. S. S. C. Eq. Rule 13 (226 U. S. 652)	65
2 Remington on Bankruptcy, 3rd Ed. Sec. 1090, p. 441	46

Supreme Court of the United States

October Term, 1932.

No. 407.

GEORGE B. MONROE,

Receiver,
Petitioner,

vs.

LOUIS RAPHAEL,

Respondent.

BRIEF IN BEHALF OF LOUIS RAPHAEL, RESPONDENT.

Statement of the Case.

This writ of certiorari, granted on the petition of George B. Monroe, Receiver, brings to this court for review, a decree of the United States Circuit Court of Appeals for the First Circuit dated June 27, 1932 (R. 75). Said decree was entered in pursuance to an opinion of a majority of that court (R. 64 to 72). It reversed an order of the United States District Court for the District of Massachusetts, dated December 7, 1931, which order enjoined this respondent from proceeding beyond judgment in a suit theretofore begun and prosecuted by the respondent in the Massachusetts Superior Court against the principal and sureties on a bond (R. 59).

The material facts are shown in the transcript of record by an agreed statement (R. 1 to 4). Paragraphs H and I of said agreed statement incorporate by reference the statements of two other documents, namely: the "Petition for Leave to Institute Proceedings Upon Bond" (R. 7 to 14) and "Plea of Louis Raphael" (R. 33 to 38). From these three documents, the following undisputed facts appear:

A. THE PROCEEDINGS IN THE DISTRICT COURT CONCERNING MONROE STORES, INC.

On July 14, 1930, four creditors of Monroe Stores, Inc., a Massachusetts corporation, as joint plaintiffs appearing by Andrew J. Aldridge, Esquire, filed a bill in equity in the United States District Court for the District of Massachusetts against said corporation as the sole defendant in said bill. Said bill is entitled *J. B. Hirshfeld & Co., Inc., et al., plaintiffs, vs. Monroe Stores, Inc., defendant,* and is numbered 3293 Equity on the docket of said District Court (R. 1).

The bill alleged that said Monroe Stores, Inc., "was engaged in the business of operating chain stores for the sale of dry goods," that its liabilities aggregated about $95,000.00, but that its "assets exceeded its liabilities"; that it could not meet its obligations as they matured "without a great sacrifice in value" of its assets which had been invested; that creditors had already made some attachments and other attachments were threatened. The bill alleged that a receiver was therefore necessary "in order to conserve its assets and to avoid threatened attachments, waste and loss." The bill accordingly prayed for a receiver (R. 1 & 2, par. A).

1. The Receivership, by Consent of Monroe Stores, Inc.

On the date of the filing of said bill, an order of notice was issued thereon returnable on July 21, 1930, directed to said defendant, Monroe Stores, Inc., to show cause why a receiver should not be appointed (R. 2, par. B). Service of said order was accepted in behalf of said defendant, Monroe Stores, Inc., by Thomas W. Morris, Esquire, who appeared as its attorney and filed an answer in its behalf admitting the allegations of the bill and assenting to the prayer for the appointment of a receiver (R. 2, pars. B and C). The District Court accordingly entered a decree on July 23, 1930, appointing George B. Monroe of Quincy, Massachusetts (the treasurer of Monroe Stores, Inc.) as receiver, with authority to carry on the business of the corporation (R. 2, par. D). Five days later, to wit, on July 28, 1930, said receiver, having duly qualified, filed a petition to employ said Andrew J. Aldridge and said Thomas W. Morris, Esquires, as counsel for the receiver, which petition was allowed on the same day (R. 2, par. E).

Thereafter, the District Court issued an order requiring persons holding claims against said Monroe Stores, Inc., to present their proofs of claim to said receiver on or before September 30, 1930. Later, the time fixed in said order was extended by the court to November 15, 1930 (R. 8, par. 3). This respondent duly presented his proof of claim to said receiver on September 25, 1930 (R. 8, par. 4).

2. Dempsey's Offer.

On November 10, 1930, the receiver petitioned for, and the District Court granted him, "leave to advertise for sealed bids for all the assets and property of the defendant

corporation including cash on hand, merchandise, fixtures, good will and all other assets" (R. 2, par. F). On November 25, 1930, one Harold A. Dempsey filed an offer to purchase all said assets (R. 2 and 3, par. G, and pp. 10 to 13, Exh. A).

The court's attention is respectfully directed to the express stipulation of the parties, namely, that

> "the statements concerning said offer and concerning the other proceedings set forth in the petition entitled 'Petition by Louis Raphael, a Creditor of Monroe Stores, Inc., for Leave to Institute Proceedings Upon Bond' and numbered 3 in the praecipe *are true,* and the copies of the offer and of the bond thereto annexed as Exhibits A and B are true and correct copies of said respective documents" (Par. H of Agreed Statement, R. 3).

The petition so referred to in said stipulation (R. 7 to 9 incl.) expressly shows that Dempsey's offer was "filed in this court" (R. 7, par. No. 1). The offer bears the name of the District Court and the name of the case (R. 10), and it specifically stipulates for the "acceptance of this offer by the court" (R. 12, par. No. 8).

By the terms of the offer, Dempsey assumed several and distinct obligations: (a) for the benefit of the creditors, (b) for the benefit of the receiver and (c) for the benefit of the stockholders of said Monroe Stores, Inc.

As to creditors, the offeror became obligated to pay thirty per cent of their respective claims "in or within thirty days after their claims have been duly approved and allowed, it being understood that said creditors shall include only those creditors who have filed their proof of

claim with the Receiver pursuant to the order of this court on or before the 15th day of November, 1930." The offer stipulated that Dempsey "shall have the right to contest any and all claims in which the receiver sets forth a good objection to the allowance of said claims" (R. 10 and 11, par. No. 1).

As to the receiver, Dempsey undertook, in a separate paragraph, to "pay any and all liabilities of the receiver [for merchandise, administration expenses, counsel fees, etc., not exceeding $20,000.00] within thirty days after said claims against the receiver have been duly allowed by this Court" (R. 11, par. No. 2).

As to the stockholders, Dempsey obligated himself to convey all the assets to a corporation which was to have three classes of stock, namely, preferred, Class A and Class B, and the stockholders of Monroe Stores, Inc., were given a right to acquire preferred and Class A stock (R. 11 and 12, pars. Nos. 3 to 5).

Dempsey further offered, among other things, to "present to the court," within seven days after the acceptance of his said offer, "a bond in the penal sum of $100,000.00 with good and sufficient sureties" to be conditioned upon his performance of "the obligations of the offer" (R. 12, par. No. 7).

3. Dempsey's Bond and the "Good and Sufficient Sureties."

Dempsey's said offer was duly accepted and he thereupon "filed in this court" *(i. e.,* in the District Court) a bond in the penal sum of $100,000.00 (R. 8, par. No. 2).

By said bond dated November 23, 1930, the principal and sureties "are firmly bound and obliged unto the United States of America in the full and just sum of $100,000.00." The condition set forth in the bond refers to Dempsey's said offer and to the requirement of "a bond guaranteeing the performance of the conditions and terms" thereof, and then states that "if the said Harold A. Dempsey shall comply with all the conditions and items of said offer, then this obligation to be void, otherwise to be and remain in full force and virtue" (R. 13 and 14, Exh. B).

Two individuals, namely, Louis F. Buff and Clifford S. Drake signed the bond as sureties (R. 14), and on December 2, 1930, they filed in court affidavits for the purpose of qualifying as "good and sufficient sureties" (R. 4-7 incl.).

Drake's affidavit stated that he was then the owner of certain "free and clear real estate" (consisting of a 'List of Properties' thereto annexed, R. 5-6) aggregating "at assessed values" $80,255.00; that he had an equity in three other parcels amounting to $12,600.00 (R. 6); that he owned "outright not less than $75,000.00 worth of tax titles," that he had first mortgages amounting to $5,000.00 and "good stock exchange collateral worth $29,000.00, making total assets of not less than $201,855.00 and my liabilities do not exceed $43,600.00, making my net worth not less than $158,255" (R. 4 and 5).

Buff's affidavit stated that he owned equities valued respectively at $49,000.00, $94,000.00 and $53,000.00 in three parcels of real estate in Boston, Massachusetts, that he owned preferred stock of the Henrici Laundry Machinery Co. worth $150,000.00, that his credit was good and that he was "worth in good property not less than $600,000.00 over

and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property" (R. 7).

Upon the filing of said affidavits, which showed the net worth of the sureties to be more than seven and a half times the penal sum of the bond, "said bond and said sureties thereon were duly approved by the court on December 2, 1930" (R. 8, par. No. 2), and thereupon, the receiver conveyed to Dempsey all the assets of Monroe Stores, Inc. (R. 9, par. No. 6).

4. The District Court Authorizes Raphael to Sue on the Bond.

This respondent's proof of claim was "duly approved and allowed" on February 9, 1931, in the sum of $35,000.00 (R. 8, par. No. 4). Dempsey, Drake and Buff "duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel" (R. 8, par. No. 4). After the lapse of thirty days from the date of allowance of his said claim, the respondent, on or about March 12, 1931, "duly demanded" of Dempsey, Drake and Buff, payment of the thirty percent of the amount thereof, to wit, $10,500.00 (R. 9, par. No. 4). Thereafter, the respondent received "through counsel for said Harold A. Dempsey on account of the amount due him as aforesaid" the sum of $1200.00, leaving an unpaid balance of $9300.00 "with interest thereon from March 11, 1931, when demand for payment was duly made by him as aforesaid" (R. 9, par. No. 5).

As no payment was made on said balance, the respondent, "after conferring with said receiver and with his

knowledge'' (R. 34, par. No. 3), filed in said District Court, on March 23, 1931, his said petition (R. 7-9) praying ''that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond'' (R. 9). An order allowing the prayer of said petition was duly entered by said court March 23, 1931 (R. 10).

B. THE SUIT ON THE BOND BROUGHT BY THIS RESPONDENT AS "RELATOR" AGAINST DEMPSEY, DRAKE AND BUFF IN THE MASSACHUSETTS SUPERIOR COURT.

1. The Respondent Obtained, in the State Court Proceedings, Liens by Attachment and Injunction on Property of Drake and Buff.

On April 9, 1931, the respondent as ''relator'' brought, in the Superior Court for the County of Suffolk in the State of Massachusetts, a bill in equity on said bond in the name of the United States of America as plaintiff against said Dempsey, Drake and Buff, as defendants, to reach and apply in equity, under the Massachusetts General Laws, chap. 214, sec. 3, certain shares of stock and other property of said Drake and Buff toward the payment of said balance due him on his said claim. Said bill was entitled ''*United States of America, ex rel., Louis Raphael vs. Harold A. Dempsey, et als.*'' (R. 3, par. 1).

In the interest of clarity, the respondent, at this point, respectfully directs the attention of the court to the stipulation of the parties to this cause that the facts as to the proceedings on said bill in the Suffolk Superior Court and also as to ''the proceedings in said United States District

Court in said case of *J. B. Hirshfeld & Co., Inc., et al., vs. Monroe Stores, Inc.*" are truthfully set forth in the "Plea of Louis Raphael" (R. 3, par. I). Said plea and exhibits A, B, C, and D thereto annexed appear on pp. 33 to 50 of the transcript of record.

By said plea, so incorporated in said stipulation, it appears that "in said Superior Court proceedings, said Raphael [the respondent] obtained and now has attachments upon property of said defendants Drake and Buff, and injunctions restraining the transfer by them of certain property to secure the payment of the amount justly due him" (R. 36, par. No. 9).

2. The Motion to Dismiss.

On May 25, 1931, Dempsey, Drake and Buff filed, in the State Court proceedings, a motion to dismiss based on the ground that subsequently to the commencement of the State Court proceedings, an "ancillary bill of complaint" for breach of said bond had been filed against them in the United States District Court by counsel for the receiver (R. 34, par. No. 4). On June 15, 1931, said motion to dismiss being then reached for hearing, Dempsey, Drake and Buff waived said motion by a written stipulation filed in the Superior Court on said date (R. 34, par. No. 4 and pp. 38 and 39, Exh. A), and thereafter, filed an answer to the merits (R. 34, par. No. 5). Thereupon, said Superior Court case was referred to a master who heard evidence from about July 7 to about July 22, 1931 (R. 35, par. No. 5). George B. Monroe, the said receiver, and said Andrew J. Aldridge, Esq., one of the attorneys for said receiver, were both called by this respondent as witnesses before the master (R. 35, par. No. 5). The master filed his report on October 5, 1931 (R. 35, par. No. 6).

3. The Master's Report.

The master's report sets forth a summary of the bill brought in the State Court (R. 39 to 42), and a summary of the answer thereto filed by Dempsey, Drake and Buff (R. 42 and 43). The report then states the facts as to the proceedings in the United States District Court which led to the appointment of the receiver (R. 44, pars. No. 2 and 3), the due presentation and allowance of this respondent's claim in the receivership proceedings (R. 42, pars. No. 4 and 5), the advertisement for bids, the bid by Dempsey, the acceptance thereof, and the filing of said bond (R. 44 and 45, pars. No. 6, 7 and 8). The master finds that Dempsey "was merely a straw and nominee for the defendants Buff and Drake, and had no financial interest other than he was acting for them to purchase the property"; that he acted "as their agent" and "at their request," and that on December 2, 1930, the date of the approval of said bond by the District Court, Dempsey received from Buff and Drake a bond to indemnify him "against any liability or loss as the result of the offer, and on the bond which the said Dempsey signed as principal in the United States District Court" (R. 45, pars. No. 9, 13 and 14).

With respect to these findings by the master this respondent respectfully refers the court to paragraph No. 8 of the Ancillary Bill of Complaint filed by the Receiver which also sets forth that although Dempsey "appears as a purchaser of the assets * * * the said Louis F. Buff and Clifford S. Drake are the real parties in interest and the real purchasers of the assets" (R. 17).

The master finds that the $1200.00 paid to this respondent in March, 1931, "through counsel for" Dempsey (R.

9, par. No. 5), was money which was furnished by Drake and Buff (R. 48, par. No. 29).

It appears by the master's report, that after the receipt by Dempsey of the receivership assets, "the defendants Buff and Drake, through their counsel Thomas W. Morris, Esquire, organized a Delaware corporation, known as the Monroe Stores Corporation" and that Dempsey, at their direction, transferred all those assets to the new corporation (R. 46, par. No. 16); that Drake and Buff and their attorneys Thomas W. Morris and Ralph H. Robb, Esquires, were the only officers and directors of the new corporation, (which changed its name to W. E. Noyes Co. on December 31, 1930) (R. 47, par. No. 20), and that Dempsey received from that corporation "an agreement to save him harmless from all obligations of the offer made for the purchase of the Monroe Stores, Inc. property and his being principal on the bond" (R. 46, par. No. 18). It also appears by the master's report that "a similar agreement was given by the said [new] corporation to * * * Buff and Drake" (R. 46, par. No. 18).

The master found in favor of this respondent [Raphael] against Dempsey, Buff and Drake for the balance of $9300.00 with interest from March 12, 1931 (R. 48, par. No. 30). The defendant Drake testified before the master, "that the only reason he had for not paying the balance due the plaintiff [Louis Raphael] was because he has an agreement from the Monroe Stores Corporation to save him harmless" (R. 48 and 49, par. No. 31).

The master finds Buff to be the owner of a large number of shares of stock in various corporations, namely, Monroe Stores Corporation (later known as W. E. Noyes

Co.), Henrici Laundry Machinery Co., Babson-Dow Mfg. Co. and Buff & Buff Mfg. Co. (R. 46 and 47, pars. No. 19, 21, 22 and 23). Drake is found to be the owner of shares of stock in W. E. Noyes Co., and owner of 100 shares of preferred stock of Mullins Mfg. Co. (R. 46 and 47, pars. No. 19 and 25). The master also finds Drake to be the beneficial owner of a large number of parcels of land respectively standing of record in the names of seven nominees (R. 47-48, pars. No. 26 and 27), the depositor in three banks, and the holder of various mortgages on real estate aggregating approximately $150,000.00 (R. 48, par. No. 28).

4. Confirmation of the Master's Report and the Respondent's Motion for a Final Decree Thereon.

After the filing of the master's report, Dempsey, Buff and Drake filed a motion to recommit said report, alleging that their motion to dismiss was "still pending" (R. 49, Exh. C). The motion to recommit was denied on October 20, 1931 (R. 35, par. No. 6), as it clearly appeared that they had expressly waived their motion to dismiss by written stipulation filed in court several months before (R. 38 and 39, Exh. A), and that a motion to recommit based on that ground could have only delay for its object. They also filed a motion to amend their answer by adding thereto substantially the same allegation that had already been waived in the stipulation on the motion to dismiss, namely, the pendency in the United States District Court of said ancillary bill (R. 49 and 50, Exh. D). Said motion to amend was also denied by the Superior Court on October 20, 1931, after hearing, and on said last mentioned date, the Superior Court "duly entered an order upon the motion of said Raphael confirming said master's report" (R. 35, par. No. 6).

It is important to note that no objections or exceptions were filed to the master's report and that no appeals were taken from any of said orders entered in the Superior Court on October 20, 1931 (R. 35, par. No. 6). The time for appeal having elapsed, and the case in the Superior Court being "ripe for the entry of a final decree in accordance with the findings of the master in said report as confirmed" (R. 35, par. No. 6), this respondent filed in the Superior Court on November 13, 1931, a motion for the entry of a final decree. The respondent also submitted for the consideration of the Superior Court a proposed form of final decree (R. 28 to 31) "calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of said Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him" (R. 35, par. No. 7). Said motion for final decree was marked to be heard on December 7, 1931 (R. 35, par. No. 7).

5. The Federal Court's Order of Notice Suddenly Interrupts the State Court Proceedings.

The Superior Court case being thus ripe for the entry of a final decree and the motion for the entry of such a decree having been filed and marked for hearing in that court by this respondent, his counsel was thereafter, to wit on December 1, 1931, served with notice that the receiver had filed in the United States District Court, on November 27, 1931, in said original case of *J. B. Hirshfeld, Inc., et al., v. The Monroe Stores, Inc., No. 3293 Eq.*, the motion against this respondent which started this litigation between these parties (R. 27-33). The receiver's motion was to modify the order which had been entered in the United States District Court on March 23, 1931, and which had authorized

this respondent to sue on the bond in the name of the United States of America for his own benefit (R. 27 and 28). Said motion also prayed for an injunction against this respondent to restrain him from further prosecuting said State Court proceedings "except insofar as to reduce his claim to judgment" (R. 28).

The record shows that upon the filing of said motion, the District Court issued a temporary restraining order enjoining this respondent from proceeding with the State Court suit and an order of notice directed to the respondent returnable December 3, 1931 (R. 32). As this injunction suddenly interrupted the State Court proceedings, it is in order at this point to note what transpired in the Federal Court after this respondent had commenced the State Court proceedings.

C. THE PROCEEDINGS BROUGHT IN THE FEDERAL COURT AGAINST DRAKE AND BUFF, AFTER THE RESPONDENT'S STATE COURT SUIT HAD BEEN INSTITUTED, DID NOT REACH OR APPLY THEIR PROPERTY.

1. The "Ancillary Bill" in the Federal Court and the Disposition Thereof By a Consent Decree Providing for a Mere Unsecured Judgment.

It appears that on April 16, 1931, an "Ancillary Bill of Complaint" was filed in said District Court by Andrew J. Aldridge, one of said counsel for the receiver (R. 14 to 18). The United States of America was named as "petitioner" in said ancillary bill. The only defendants named therein were said Dempsey, as principal, and said Drake and Buff, as sureties on said bond (R. 14 and 15, pars. No. 2 and 3), certain corporations in which said Buff was alleged to own stock (R. 16, par. No. 6); two persons who

were alleged to hold the legal title to certain real estate for the benefit of Drake, namely, Ida M. Hodgson and Louise C. Castleman (R. 16, par. No. 7,; and the Atlantic National Bank of Boston in whose hands Drake was alleged to have deposited "a large amount of securities" (R. 16 and 17, par. No. 7).

Said ancillary bill recited said offer of Dempsey, the acceptance thereof and the filing of said bond "in this cause" (R. 14, pars. Nos. 1 and 2) and then recited:

> "There is due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors* who have filed their claims and which claims have been allowed by this court, a total balance of $34,856.14; that more than thirty days have elapsed since said claims were approved and allowed by this court and the payments thereon are past due and now owing. The obligations of the receiver which have not been paid by the said Harold A. Dempsey are past due and now owing" (R. 15, par. No. 4).

On May 4, 1931, an injunction was issued by said District Court on said ancillary bill restraining Dempsey, Drake and Buff from transferring or encumbering their property, or withdrawing funds from any banks, "until the further order of this court" (R. 18 and 19). Although said injunction provided for completion of pleadings on said ancillary bill by May 8, 1931, and for hearings before a master (R. 20), no evidence was heard thereon, and on July 16, 1931, a final decree, entered thereon by consent, merely ordered the entry of judgment for the plaintiff in the sum of $33,026.83 and costs against Drake, Buff and Dempsey, "jointly and severally, and that execution issue forthwith" (R. 20).

With respect to said ancillary bill of complaint, the respondent, Raphael respectfully directs the court's attention to the facts shown by the specific agreement of the parties to this proceeding, namely, "that said Raphael was not made a party to said ancillary bill of complaint, that he is not mentioned therein, that his claim is not referred to therein and that he has never taken any part in any hearings thereon" (R. 37, par. No. 12).

2. The Petition for Contempt Filed by the Receiver, and the Disposition Thereof By a Consent Decree Allowing Drake and Buff to Pay the Judgment in Instalments Over a Period of More Than Three Years.

On October 7, 1931, the receiver filed in the United States District Court a petition against said Buff and Drake as respondents seeking to have them adjudged in contempt for failing to pay the judgment and execution which had been issued against them by said court on July 16, 1931 (R. 21 to 26). Said contempt petition charged that Drake had taken a false oath with respect to the item in his affidavit concerning the amount of tax titles (R. 22, par. No. 8). It also charged that Buff and Drake had attempted, through the medium of a credit adjustment agency, to buy off the claims of the creditors at 15%, instead of paying them the thirty per cent as promised in said offer and said bond (R. 23, par. No. 14). Copies of two letters sent by the agency urging creditors to accept 15% are set forth in the record (R. 24-26).

In the contempt petition, the receiver alleges on information and belief that Buff and Drake "are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and

under their control assets of which they are the actual owners, sufficient to satisfy in full the judgment" (R. 23-24, par. No. 15).

No evidence was heard on said contempt petition, and again, as they had done in the final decree on the ancillary bill (R. 20), Buff and Drake assented to an order (R. 26 and 27). This order, dated October 21, 1931, requires them to pay $1,000.00 per month to the receiver until the execution is satisfied. It also appears by the order that the W. E. Noyes Co. (the corporation formerly known as Monroe Stores Corporation which Buff and Drake had organized in December, 1930, to take over the assets purchased in Dempsey's name), had already gone into bankruptcy, and that Dempsey, Drake and Buff held a claim or claims against that bankrupt corporation, which they agreed, by said order on the contempt petition, to assign to the receiver (R. 26).

This respondent respectfully calls attention to the fact that he was not a party to said contempt petition, that he received no notice of any proposed hearings or proceedings thereon, and "has never taken part in any hearings" thereon (R. 37, par. No. 12).

D. THE PROCEEDINGS IN THE DISTRICT COURT ON THE RETURN OF THE ORDER OF NOTICE ISSUED ON THE RECEIVER'S MOTION TO ENJOIN THE STATE COURT SUIT.

The above details as to the ancillary bill and the contempt petition came to the notice of counsel for this respondent, when the State Court suit was suddenly brought to a halt by the service on respondent's counsel of said order of notice issued on the receiver's motion for an injunction. No service of said order was made upon this re-

spondent, who is and for many years has been a resident of New Britain, in the County of Hartford, in the State of Connecticut (R. 33 and 37, par. No. 13).

Counsel "appearing specially" for the respondent, filed a plea to said receiver's motion (R. 33 to 50). The plea was under oath. It set forth what had occurred in the receivership proceedings and in the State Court suit. There was no dispute as to these statements in the plea. The stipulation in the record shows that they were true (R. 3, par. 1). The hearing that was had on the return day of said order of notice appears by the stenographic transcript (R. 51 to 59). The stenographic record shows that no evidence was offered by the receiver in support of his motion, and that there was no evidence before the court other than the documents annexed to the plea, and said sworn plea, the allegations of which, with respect to all the proceedings both in the State Court and in the Federal Court are true, as appears by the stipulation of the parties (R. 3, par. 1).

In his argument on said motion, counsel for the receiver admitted that a balance of $9,300.00 of the principal amount of $10,500.00 was "now due" to this respondent, and that the same "has been due for some time," and stated that the respondent "is entitled to his money without question" (R. 51 and 52).

After hearing the arguments, the District Court, on December 7, 1931, entered an order modifying the order of March 23, 1931 (which had permitted the respondent to bring proceedings on the bond), and enjoining the respondent from further prosecuting his suit in the Superior Court "except that the said Louis Raphael may proceed in said cause to judgment, but no further" (R. 59 and 60).

From said order, the respondent duly appealed to the United States Circuit Court of Appeals for the First Circuit (R. 60 and 61). In the majority opinion of the Circuit Court (R. 64 to 72), after a careful summary of the facts and of the issues presented by the appeal to that court, Bingham, J. considered the question "whether the District Court had, by reason of the receivership proceedings, such jurisdiction of the subject matter of the suit in the state court as to authorize it to issue an injunction restraining its further prosecution" (R. 68). Relying upon established principles and citing numerous authorities in support thereof, the majority opinion reaches the conclusion that the District Court was without jurisdiction to enjoin this respondent from proceeding with his suit in the State court against Dempsey, Drake and Buff *in personam* and from enforcing his attachments against their shares of stock and other individual property. The Circuit Court therefore found it "unnecessary to deal with the other points raised" in that court by this respondent (R. 72), and entered a decree reversing the order of injunction issued by the District Court against this respondent (R. 75).

The only authorities cited by the dissenting Judge in support of his opinion are Sec. 24 of the Judicial Code and two decisions, namely: *Howard vs. U. S.*, 184 U. S. 676, and *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349 (R. 72-74).

Points and Authorities.

I. THE SUIT PENDING IN THE STATE COURT IS AGAINST DEMPSEY, DRAKE AND BUFF IN PERSONAM AND THE FEDERAL COURT WAS WITHOUT JURISDICTION TO ENJOIN IT.

The suit in the state court, which has been pending for months, was clearly "one *in personam*," as the Circuit

Court says in its opinion (R. 69). It seeks to enforce the personal obligations assumed by Dempsey, Drake and Buff under the bond. It was commenced with the express approval of the District Court, and it has not even been argued that the jurisdiction of the state court did not properly attach. The District Court order which was reversed, expressly says, in referring to the state court suit, "that the said Louis Raphael may proceed in said cause to judgment" (R. 60). It was thus clearly recognized that the state court suit had been properly begun and prosecuted by this respondent.

Section 265 of the Judicial Code (28 U. S. C. A., sec. 379), provides,

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It has been clearly said by the United States Supreme Court that, unless a case falls within the recognized exceptions to this express statute, "a federal court sitting in equity * * * lacks the power to stay an action in the state court."

> *Riehle v. Margolies*, 279 U. S. 218 at 228; 49 S. Ct. 310 at 314.

In speaking in that case of the issuance by a Federal Court of an injunction to enjoin a pending state court suit, Mr. Justice Brandeis, says at p. 223,

> "the rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached the right cannot be restrained by proceedings in any other court, applies to protect the

jurisdiction of the court unless the case is within some recognized exception to sec. 265 of the Judicial Code."

It is well settled that an action *in personam* pending in a state court is not within the recognized exceptions and cannot be enjoined by a federal court.

Kline v. Burke Construction Co., 260 U. S. 226; 43 S. Ct. 79.

Riehle v. Margolies, ubi supra.

Baltimore & Ohio Ry. Co. v. Wabash Rd. Co., 119 Fed. 678 (C. C. A.).

W. E. Stewart Land Co. v. Arthur, 267 Fed. 184 (C. C. A.).

In *Kline v. Burke Construction Co., ubi supra,* the Supreme Court, speaking by Mr. Justice Sutherland, says at p. 229,

> "It is settled that where a Federal Court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State Court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal Court the possession or control, actual or potential, of the *res*, and the exercise by the State Court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal Court already attached. * * *

(at p. 230):

> "* * * But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in

> which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

This principle has been expressly applied in suits against purchasers of assets from a Federal receivership. Where the purchaser of the assets of a corporation held by a Federal receiver agreed to pay the debts of the corporation, an action brought in a state court by a creditor of the corporation against the purchaser upon that obligation to pay, has been held to be a suit *in personam* and not to be subject to injunction by the Federal Court.

Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

Railroad v. Manton, 164 U. S. 636, 17 S. Ct. 216.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43.

Western Union Tel. Co. v. U. S. Trust Co., 221 Fed. 545.

Ex parte Equitable Trust Co., 231 Fed. 571, 591.

International Great Northern Ry. Co. v. Binford, 10 F. (2) 496. Cert. denied, 273 U. S. 694, 47 S. Ct. 91.

Magid v. Westmoreland, 15 F. (2) 884. aff. in 15 F. (2) 885.

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263 F. 237 and 278 F. 832.

In re Kanter & Cohen, 121 Fed. 984.

U. S. Mort. Co. v. Mo. Ry. Co., 269 Fed. 497; cert. denied, 41 St. Ct. 538, 256 U. S. 699.
Lassiter v. Norfolk Ry. Co., 79 S. E. 264.

In Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337, the Trust Co. was a creditor of the Kansas City Suburban Belt Railroad Co. A receiver was appointed by the Federal Court upon a proceeding in equity to foreclose a mortgage on that railroad. A reorganization committee purchased the railroad from the receiver and turned it over to a new corporation called the Kansas City Southern Railway Co. The decree of foreclosure contained the usual provisions that the purchaser should pay the cost of foreclosure, the receiver's liabilities, and such claims as should be adjudged "prior in lien or superior in equity to the mortgage foreclosed herein upon the property sold." Thereafter, the Trust Co. brought suits at law in the State Court of Missouri claiming personal judgments against the Southern Railway Co. on the ground that the latter had become obligated to pay the Trust company's claims against the Kansas City Suburban Belt Rd. Co. but not because those claims were "prior in lien or superior in equity to the mortgage." Thereupon the Southern Railway Co., by an ancillary bill in the Federal receivership proceeding, obtained an injunction in that court prohibiting the Trust Co. from prosecuting the suits in the State Court. The Trust Co. appealed. The Circuit Court of Appeals, in reversing the order for the injunction, said at p. 341:

> "* * * The actions at law are founded upon no lien and upon no claim of lien upon any of the property mortgaged and sold under the decree of the court below. They rest upon the single claim that the Southern Company has both impliedly and expressly promised

to pay the claims which they disclose to the trust company and the only relief which the latter seeks in them is a general judgment that it may recover the amount of these claims from the Southern Company. How, then, can these actions in any way invade the exclusive jurisdiction, or impeach the decree of the court below or the title of the Southern Company thereunder. * * *"

(At p. 342):

* * *" The actions at law here under consideration are against the purchaser, and they rest upon its independent liability, not upon that of the mortgagor, and the lien of the levies under the judgments, if any should be rendered therein, will be neither prior in right nor superior in equity to the lien of the mortgage, but will be effective only because the debtor, the Southern Company, has acquired the title to the property and has thereby made it liable for its personal obligations. When a judgment debtor takes title to property which he buys at a foreclosure sale or otherwise, the judgment against him immediately settles upon it. When a debtor buys such property it becomes liable to be seized under any judgment that may be subsequently rendered against him."

(At p. 343):

* * * "Our conclusion is that the order for a temporary injunction herein was improvidently granted because an action for a personal judgment against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was incorporated and under which it bought the property is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage, nor an impeachment of the decree or of the title thereunder."

This case is cited with approval in *Kline v. Burke Construction Co.*, 260 U. S. 226 at 231, 43 S. Ct. 79 at 81.

In *Western Union Tel. Co. v. U. S. Trust Co., ubi supra,* the Western Union Co. was a creditor of the Kansas City, Mexico & Orient Railway Co. A receiver was appointed by the Federal Court in a proceeding in equity to foreclose a mortgage on that railway. After the sale the Western Union Co. and other creditors brought suit in the State Court of Kansas against the purchaser at the foreclosure sale. The Federal Court enjoined the State Court suits. The Circuit Court of Appeals, in reversing the order for the injunction, said, by Sanborn, J. at p. 555,

> "The prosecution or threatened prosecution in other courts by creditors of a mortgagor of actions *in personam* against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under him, upon alleged promises or legal liabilities made or incurred by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, title, or interest in the specific property in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree."

Another case bearing strongly on the case at bar is *International-Great Northern Rd. Co. v. Binford, ubi supra.* There the International and Great Northern Rd. Co. had gone into the hands of an equity receiver appointed by the United States District Court, and its property was sold by the receiver under a foreclosure decree to a new corporation organized for that purpose. The decree of sale provided that the property was sold subject to claims prior in equity to the mortgage. Thereafter, the Concrete Company, a creditor of the old railroad company, whose claim accrued for current expenses of operation within two years of the receivership, sued the purchaser in the Texas State Court,

on the ground that the purchaser was charged with the payment of the debts of the old company and on the ground that a fraud had been practiced by the purchaser, in that stockholders of the old company received benefits from the organization of the new company and from the purchase by it, whereas no provision was made for claims such as this creditor held. That suit, in the Texas Court, resulted in a judgment for the creditor. Thereupon the purchasing corporation (or rather its successor), brought a bill in the United States District Court to enjoin the sheriff from enforcing the judgment. The District Court denied the prayer for injunction. In affirming this denial, the United States Circuit Court of Appeals for the Fifth Circuit said at p. 498:

> "* * * The suit brought by the Concrete Company did not assert a claim that the debts it held were chargeable against the property sold under the abovementioned decree when title to that property was acquired by the purchaser at such sale. * * * The other claim asserted in the suit brought by the Concrete Company likewise was based on alleged transactions subsequent to the acquisition of title to the property by the purchaser at the sale under the court's decree. In our opinion that suit did not involve controversies which were ancillary and dependent on the receivership and foreclosure suit. The rule as to the ancillary jurisdiction of a court to deal with claims in respect of property there impounded was stated and applied in the case of *Central Union Trust Co. v. Anderson County*, 268 U. S. 93, 45 S. Ct. 427. The statement of the jurisdiction by no means indicates that it has such a scope as to enable a court to draw to itself the determination of any claim of an interest in or a charge upon property impounded which did not come into existence until after the court surrendered custody and control and after the owner through the sale of the property under the court's decree was free to subject it to liability.

> * * * The claims sought to be brought before the court for adjudication by the proceeding instituted by the appellants were not within the ancillary jurisdiction which was invoked, as they did not accrue until after the sale under the court's decree of the property affected by them."

In the case at bar the District Court parted entirely with all the assets of the Monroe Stores, Inc., over which the receiver had been appointed, and did not, by the decree of sale or otherwise, retain jurisdiction to itself to determine all future litigation against the purchaser of the assets.

This respondent is seeking, in the State Court, merely a judgment *in personam* against the purchaser and the two sureties. No right, lien or other interest in the specific property that was turned over by the Federal Court to the receiver is sought in the State Court. The property that has been attached and which is sought to be reached and applied in the State Court never belonged to the Monroe Stores, Inc., and never was in the possession of the receiver, namely, mortgages, certificates for shares of capital stock, real estate and bank deposits belonging to Buff and Drake personally. That property was attached in the State Court on April 9, 1931, when the State Court proceedings were begun (R. 34, par. No. 4), and thereupon came within the prior jurisdiction of the State Court.

II. THE FEDERAL COURT INJUNCTION RESTRAINING THIS RESPONDENT FROM ATTEMPTING TO ENFORCE THE LIENS OBTAINED BY HIM IN THE STATE COURT SUIT CANNOT BE JUSTIFIED ON THE GROUND THAT HE MIGHT THEREBY OBTAIN A PREFERENCE.

The dissenting judge in the Circuit Court of Appeals justified the injunction on the ground that the respondent

might "obtain a preference" by the enforcement of the State Court attachments (R. 73). The receiver has also attempted to justify the injunction on the ground of preference. This respondent respectfully submits that an examination of the record shows that the injunction was not warranted on any such basis.

Drake and Buff were not and are not in bankruptcy. Nor is there anything in the record showing that they were or are insolvent. On the contrary, the record shows that they are amply solvent.

A. The Record Shows That Drake and Buff Are Solvent.

Their total obligations under the bond aggregated less than $35,000 in amount (R. 15 par. No. 4). Less than five months before the State Court suit was commenced, they had filed the sworn affidavit showing that Buff's net worth was "not less than six hundred thousand dollars ($600,000.00) over and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances, and lawful claims upon my property" (R. 7). Drake's net worth at that time was "not less than one hundred fifty-eight thousand two hundred fifty-five dollars ($158,255.00)" (R. 5). Thus the aggregate net worth of the sureties was in excess of seven hundred and fifty thousand dollars ($750,000.00), only five months before the State Court suit was commenced.

The record further shows that the receiver himself alleged on October 7, 1931, when he filed the contempt petition against Drake and Buff, that they

> "are financially able to pay the full amount of the judgment rendered against them in this cause and have

> in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment" (R. 23-24 par. No. 15).

This statement as to the financial standing of Drake and Buff was made by the receiver only two months before the District Court enjoined the State Court suit, and several months after the State Court attachments had been made.

Furthermore, on October 5, 1931, the master filed his report showing that Drake and Buff were possessed of large amounts of property, many times in value the amount of the obligations under the bond (R. 46 to 48, pars. Nos. 18 to 28). It appears by the record that they were the owners of a substantial number of shares in various corporations. The receiver has stated in his brief in this court that these shares of stock consisted of "unlisted stocks of relatively small business concerns" (Petitioner's brief, p. 10). But there is nothing in the record to support this assertion that the corporations that had issued these shares of stock were "relatively small business concerns." For example, it appears that Buff owned stock of the par value of $150,000.00 of the Henrici Laundry Machinery Co.; that he owned first preferred, second preferred and common stock of the Babson Dow Mfg. Co. and that he owned "a large number of shares of the capital stock" of Buff & Buff Mfg. Co.

As to Drake it appeared that he owned 100 preferred shares of Mullins Manufacturing Co. and since the receiver has made the assertion about "relatively small business concerns" it perhaps warrants this respondent in pointing out that the preferred stock of the Mullins Manufacturing Co. is and has been listed on the New York Stock Exchange for a long time.

The master also found that Drake holds a large number of tax titles standing in the names of various nominees who have executed deeds thereof to him and that "there are no mortgages on any of the parcels, except the last four parcels set forth in the schedule" (R. 47 and 48, pars. numbered 26 and 27). The master further found that Drake has "deposits of money to his personal credit" in three banks and that "he has various mortgages on real estate aggregating in amount approximately $150,000" (R. 48, par. No. 28). In this connection, this petitioner calls to the court's attention that the receiver, in his brief, speaks of these as "second mortgages" (Petitioner's brief, p. 10), but there is nothing in the record to warrant the statement that these mortgages were "second" mortgages, and this respondent says that this assumption as to "second" mortgages made in the receiver's brief is entirely unwarranted.

It is, therefore, clear on the record that it cannot be said that Drake and Buff were insolvent.

B. The Assertions in the Receiver's Brief as to the Insolvency of Drake and Buff are Unwarranted by the Record.

Being faced with this record as to the financial condition of Buff and Drake, the receiver now attempts, by means of further unwarranted assertions not borne out by the record, to persuade this court to conclude that the facts were otherwise than the record shows. He says in his brief:

> "It then (after the filing of the contempt petition) appeared that perhaps the sureties, Buff and Drake, had misrepresented their true wealth, and that the actual cash value of whatever assets they did possess was far less than the figures to which they had attested in their affidavits" (Petitioner's brief, p. 10).

The receiver does not vouchsafe any reference or information as to when, where and to whom this alleged information "appeared," or how far the "perhaps" bore on the fact of their insolvency. Nor does the record show that any such information "appeared." Buff, having stated in his affidavit that his net worth was not less than $600,000.00 (R. 7), might still be amply solvent even if it could be assumed that his affidavit misrepresented the value of his assets to some extent. But, of course, an assumption to such effect, cannot be made, as it would mean an assumption that Buff had committed perjury.

Proceeding further with this unwarranted assumption, the receiver repeats this bald assertion as to misrepresentation on page 12 of his brief, and there leaves out the word "perhaps." He there says boldly, as if it had been warranted by due allegation and proof, that "the sureties, Buff and Drake, had misrepresented their true wealth, and whatever assets they did possess are of questionable value under present conditions" (Petitioner's brief, page 12). This respondent says that there is absolutely nothing in the record to warrant this charge that Buff had committed perjury in his affidavit, and that the injunction of the District Court cannot be sustained on the basis of this bald assertion now made as to Buff for the first time in the brief filed by the petitioner in this court.

To bolster up his argument, the receiver in his brief in this court, also makes other large assumptions of fact, all without warrant in the record. He says as follows on page 10 of his brief:

> "It is a matter of common knowledge in these days, that equities in real estate are practically wiped out,

> that second mortgages are of no actual value and that unlisted securities in small businesses have no cash value, regardless of what the par value of the stocks may be" (Petitioner's brief, p. 10).

It is clear that there was no evidence to support any of these sweeping assumptions which the receiver's counsel asks the court to make. The respondent respectfully submits that these assertions of the receiver's brief are not in accord with fact and are entirely unwarranted; that such assumptions could only come within the purview of judicial notice, if ever, at a time when the financial structure of the country is in utter and hopeless ruin.

The receiver further includes in his brief some personal prognostications as to what would have occurred if the property of Buff and Drake were offered for sale. These assumptions are not based on the record and the receiver does not state in his brief what he does base them on. He says:

> "If these properties were actually sold, they would realize only a small fraction of their par value and their face value. There would be hardly enough to satisfy the individual claim of the respondent, Raphael, and the other creditors, and the receiver might be forced to go begging" (Petitioner's brief, p. 10).

Again on another page of his brief the receiver says:

> "As a practical result the respondent, Raphael, will obtain an inequitable preference to the disadvantage of the other creditors and the receiver, for the assets will have been exhausted, leaving an empty obligation on the bond" (Petitioner's brief, p. 12).

On still another page of his brief, the receiver says:

> "If this action, (the State Court suit) were allowed to continue to execution and the sale of the sureties' assets, which were attached therein, it would probably have resulted in an inequitable preference to Raphael at the expense of the other creditors" (Petitioner's brief, pp. 25 and 26).

These prognostications by the receiver's counsel as to the amount that could be realized if the properties of Drake and Buff were sold, are certainly pure speculations. He cites no authority for his opinions in that regard, and these speculations certainly cannot stand in the place of proof that is lacking.

C. No Question of Preference is Involved in the Absence of Bankruptcy.

Moreover, even if Drake and Buff were insolvent, there would be nothing unlawful, in the absence of bankruptcy, in their being compelled to pay this respondent the amount due him according to the master's report out of the proceeds of the sale of their assets.

Marberry v. Brooks, 7 Wheat. 575.
Estes v. Gunter, 122 U. S. 450; 7 S. Ct. 1275.
Halsey v. Fairbanks, 4 Mason 206.
Banfield v. Whipple, 14 Allen 13.
Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co., 245 Mass. 69.

In *Marberry v. Brooks, ubi supra,* Chief Justice Marshall says at p. 577,

> "That a debtor has a right to prefer one creditor to another cannot be denied."

In *Halsey v. Fairbanks, ubi supra,* Mr. Justice Story says at p. 212,

> "A creditor may be defeated or delayed in the satisfaction of his debts by a *bona fide* conveyance of a debtor's property, either on a sale or by a preference to another creditor. Such a conveyance is not rendered void by such effect, whether it be intentional or not."

In *Cosmopolitan Trust Co. v. S. L. Agoos Tanning Co., ubi supra,* Chief Justice Rugg of the Massachusetts court says at p. 73,

> "In the absence of any inhibiting statute, a debtor commits no fraud by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. * * * It is settled at common law that a debtor has a right to prefer one or more of his creditors over others."

It is thus clear that the question of preference can arise only in bankruptcy. But in the case at bar, even if there had been bankruptcy, the attachments obtained by this respondent in his State Court proceedings could not be invalidated on the ground of preference. Those attachments were made on April 9, 1931, when the State Court proceedings were commenced and this was more than four months before the District Court issued the injunction and also more than four months before the contempt petition against Drake and Buff was filed.

It is therefore respectfully submitted that the majority opinion of the Circuit Court of Appeals is right in saying that "no question of preference by Raphael over the other creditors is involved" (R. 71).

III. THE INJUNCTION RESTRAINING THE RESPONDENT FROM ENFORCING THE STATE COURT ATTACHMENTS CANNOT BE JUSTIFIED ON THE GROUND THAT THE RECEIVER HAD ANY LEGAL RIGHT OR INTEREST IN THE PROPERTY ATTACHED, FOR THE RECEIVER NEVER HAD POSSESSION OF ANY OF THE ATTACHED PROPERTY; NOR DID THE STATE COURT ATTACHMENTS INTERFERE WITH ANY FEDERAL COURT LIEN OR ATTACHMENT THEREON.

In the State Court suit, this respondent attached, and by the form of final decree submitted by him to the Superior Court, seeks to reach and apply, to the satisfaction of his claim, certain specified shares of stock, mortgages, real estate, and bank deposits of Drake and Buff (R. 28 to 31). The master has found that they are individually the owners of each of these respective items (R. 46 to 48, pars. Nos. 19 to 28 incl.). None of the property so attached constituted any portion of the assets of Monroe Stores, Inc., and none of it has ever been in the receiver's possession. The receiver is an absolute stranger to that property, and does not even so much as claim any right to the title or to the possession of any of the property under attachment. It is thus clear that the injunction cannot be justified on the ground that the enforcement of the respondent's attachments would have interfered with any property in which the receiver had any interest.

Nor can it be said that the property under attachment was in any way under the control of the District Court. It is true that on the ancillary bill, the District Court issued, on May 4, 1931, four preliminary injunctions each restraining the transfers of property by Drake and Buff, "until the further order of the court" (R. 18-19). As it appears, however, that the State Court proceedings to reach and apply had been filed previously and that pre-

liminary injunctions had already been issued and attachments made in those proceedings (R. 36, par. 9), it is clear that those preliminary injunctions issued by the State Court created valid equitable liens in favor of the respondent, just as the attachments created legal liens.

Snyder v. Smith, 185 Mass. 58.
Rioux v. Cronin, 222 Mass. 131.
Metcalf v. Barker, 187 U. S. 165, 23 S. Ct. 67.

In *Rioux v. Cronin, ubi supra,* Rugg, C. J. says at p. 137,

> "The filing of such a bill under the statute (a bill to reach and apply), accompanied by the issuance of an injunction, does create a lien in favor of the creditor."

In *Metcalf v. Barker, ubi supra,* the U. S. Supreme Court, in considering a bill by a creditor, says at p. 172 that the lien created by the filing of such a bill "is a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected."

Even if those subsequent injunctions of the District Court were still outstanding, they therefore could not affect the valid liens on the property covered by the prior State Court attachments and injunctions.

In *Kline v. Burke Construction Co.,* 260 U. S. 226, 43 S. Ct. 79, the U. S. Supreme Court says at p. 229:

> "It is settled * * * that where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction."

In *Covell v. Heyman,* 111 U. S. 176, 4 S. Ct. 355, the Supreme Court in referring to that principle, says at p. 182:

> "It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

However, the record clearly shows that the injunctions of the Federal Court are no longer outstanding. Having been issued on May 4, 1931, on the ancillary bill (R. 18 to 20), they were followed on July 16, 1931, by a consent final decree on that bill, which merely ordered a personal judgment and execution and nothing more (R. 20). The preliminary injunctions of the Federal Court were thus dissolved by its own final decree.

Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th).
Musgrave v. Staylor, 36 Md. 123.
Jackson v. Bunnell, 113 N. Y. 216.
Gardner v. Gardner, 87 N. Y. 14.

In *Sweeney v. Hanley, ubi supra,* the U. S. Circuit Court of Appeals for the ninth circuit says at p. 99, that the temporary injunction in that case had "come to an

end by the entry of the final decree in the cause making no provision for any injunction."

In *Gardner v. Gardner, ubi supra,* there was a proceeding for contempt of a temporary injunction entered in a divorce suit restraining the defendant from conveying or encumbering his property, until the further order of the court. It appeared that the final decree in that case provided for alimony and a bond, but said nothing about the injunction. Some time after the final decree, the respondent in that case did convey and encumber his property, and the lower court ruled that he was guilty of contempt. On appeal, the New York Court of Appeals reversed the decision, and said at p. 17:

> "This (the final decree) certainly disposed of the injunction, and *provided for* an allowance in its place for the plaintiff's maintenance and support. * * *"

(At p. 18):

> "There can be no question that the injunction was abrogated by the judgment * * * the final judgment was the further order of the court."

It is thus clear that there is no valid Federal Court attachment or lien affecting any of the specific property of Buff and Drake which is subject to the attachments in the State Court suit, and that the injunction which prevents the respondent from enforcing the State Court attachments cannot be justified on the ground that the property of Drake and Buff was in the custody of or under the control of the Federal Court.

IV. THE STATE COURT ATTACHMENTS DID NOT INTERFERE WITH "THE ADMINISTRATION AND LIQUIDATION" OF ANY PROPERTY IN THE POSSESSION OF THE RECEIVER, FOR HE HAD CONVEYED TO DEMPSEY ALL THE PROPERTY OF MONROE STORES, INC., AND THEREAFTER HAD NO PROPERTY IN HIS POSSESSION. THE BOND WAS NEITHER IN HIS POSSESSION NOR WAS HE NAMED AS OBLIGEE THEREOF.

The receiver contends that the injunction which he obtained against the respondent was warranted because of continued responsibility "for the administration and liquidation of the estate" (Petitioner's brief, p. 13), and he says that "otherwise the orderly and equitable administration and liquidation of the receivership estate would be prejudiced" (Petitioner's brief, p. 17). He repeats this contention frequently in his brief.

But it seems clear beyond doubt that the injunction cannot be defended on the ground that the enforcement of the State Court attachments would interfere with "the administration and liquidation" of any property in the receiver's possession. The record shows that he had conveyed to Dempsey all the assets of Monroe Stores, Inc. "of every name, nature, character and kind" including even the cash (R. 10). So far as the creditors were concerned, he was thus relieved of the trust with respect to the assets that had come to his hands when he was appointed receiver. After the conveyance to Dempsey, the receiver held no assets in his possession, and there remained no property in his hands for "administration" or "liquidation" for the benefit of the creditors. So far as they were concerned, the receiver owed them no duties, and he was receiver in name only. The receiver was not discharged at that time, only because his fees and receivership obligations

remained to be paid. These, Dempsey had obligated himself to pay and Drake and Buff had guaranteed this obligation.

Bingham, J., in the majority opinion, summarizes the situation of the receiver concisely and forcibly as follows:

> "All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser rather than to the receiver for the payment of the dividends on their claims, all that remained for the court to do was to allow the claims of the creditors and settle the account of the receiver" (R. 69).

Now, as to the bond, we find by the record that not only was the receiver not named as the obligee thereof, but that it was not delivered to him and was never in his possession.

The record affirmatively shows this, for it appears that "said Harold F. Dempsey filed *in this court* a bond, etc." (R. 8, par. No. 2). The receiver himself admits that the bond never was in his possession, but was filed in court. He says in the contempt petition, as follows:

> "Dempsey was required to file a bond with the clerk of the United States District Court" (R. 21).

It is, therefore, clear that the injunction cannot be justified on the ground that any property in the possession of the receiver would be interfered with by a levy on the property attached in the State Court suit.

V. THE UNITED STATES OF AMERICA HAD NO BENEFICIAL INTEREST IN THE BOND, IT WAS ONLY A FORMAL OBLIGEE THEREIN. THOSE ENTITLED TO THE BENEFITS SECURED OR "GUARANTEED" BY THE BOND ARE THE REAL PARTIES IN INTEREST AND ARE ENTITLED TO ENFORCE IT.

The receiver asserts in his brief as follows:

> "The possession of this bond and control of its enforcement are both in the District Court, and the sole right of suit is vested in the receiver. An individual creditor, if he can sue on the bond at all, can only do so after obtaining permission from the court itself" (Petr's Brief, p. 8).

He repeats this assertion frequently in his brief, and he attempts to support it by the cases of *U. S. F. & G. Co. v. Kenyon,* 204 U. S. 349, and *Illinois Surety Co. v. U. S.,* 226 Fed. 665.

But it is respectfully submitted that neither the record in the case at bar nor the cases relied upon by the receiver give any support to his position in this regard.

The bond, filed in court in pursuance to the offer, obligates Dempsey, Drake and Buff "to the United States of America," as obligee, not to the receiver. The purpose of the bond is expressly stated therein to be that of "guaranteeing the performance of the conditions and terms of said offer" (R. 13). Obviously the United States was named as obligee in the bond, not because it was to receive any benefits under the offer. The United States is not mentioned as a beneficiary in the offer. It was neither a stockholder nor a creditor of Monroe Stores, Inc., and had no financial interest in its affairs. The United States was named as

obligee in the bond, merely for the benefit of those beneficially interested in the obligations, the performance of which the bond guaranteed.

Three distinct sets of parties are respectively named in the offer as the beneficiaries of Dempsey's several obligations thereunder, to wit:

a. the creditors—who are each to receive thirty per cent "in or within thirty days after their claims have been duly approved and allowed" (R. 10, par. No. 1).

b. the receiver—whose liabilities for "merchandise, administration expenses, counsel fees, etc." Dempsey was to pay, to an extent not exceeding $20,000.00 (R. 11, Par. No. 2).

c. the stockholders of The Monroe Stores, Inc.—who each had a right to purchase on or before January 15, 1931 preferred stock of the new corporation "upon payment of $10.00 per share for said preferred stock of said aforesaid corporation and receive five shares of Class A stock of the aforesaid corporation for each share of the preferred stock of the aforesaid corporation acquired by them." (R. 12, Par. No. 5.)

The bond was for the purpose of "guaranteeing the performance" to be made by Dempsey of these three distinct and separate obligations. For example, the shares of Class A stock of the new corporation were to come directly to those stockholders of Monroe Stores, Inc. who entitled themselves thereto by buying preferred stock. The certificates for the Class A stock were not to be delivered to the receiver. The receiver had no interest in that. The obligation as to the Class A stock was not an obligation for the receiver's benefit. Each such stockholder had a

right to have performance of that promise made directly to him.

Likewise, the obligation as to the thirty per cent was an obligation clearly for the benefit of the creditors, not of the receiver. These thirty per cent payments were to come from Dempsey, not from the receiver, for he had conveyed to Dempsey all "the assets of every name, nature, character and kind" (R. 13) including even the cash. Nothing remained in the hands of the receiver for distribution among the creditors. The only obligation assumed by Dempsey in the offer, in which the receiver then had any interest, was the obligation to pay the fees, the administration expenses and "any and all liabilities of the receiver." (R. 11, Par. No. 2.) That was the only obligation which the bond guaranteed for the receiver's benefit.

A. The District Court Has Recognized the Obligation of Dempsey to Make Payment Directly to the Creditors.

The District Court recognized Dempsey's obligation to pay directly to the creditors and that a creditor has a right to enforce said bond for breach of this obligation, for, on March 23, 1931 it granted this respondent's petition for leave to institute such proceedings thereon (R. 7-10). Even in the order enjoining the respondent, the District Court has not denied the respondent's right to sue on the bond, for that order says affirmatively that the respondent "may proceed in said cause to judgment" (R. 59 at p. 60.)

B. Dempsey, Drake and Buff Have Themselves Acknowledged Their Obligation to Make Payment Directly to the Creditors.

In March, 1931, when the respondent demanded performance of the obligation to pay thirty per cent and when

twelve hundred dollars was paid to him on account, this payment was made not to the receiver or through the receiver, but directly to the respondent. (R. 33 and 34, par. 2.) Furthermore, the fact that Drake and Buff attempted to buy the claims of creditors for fifteen cents on the dollar (R. 24, 25 and 26), shows that they considered that the payments on the creditors' claims were to be made directly to the creditors, not to the receiver. Again, in their answer to paragraph No. 4 of the bill brought by this respondent in the State court, Dempsey, Drake and Buff expressly admitted the allegation that the thirty per cent were "to be paid to creditors." (R. 42.)

C. The Receiver Himself Has Recognized That Dempsey Was Obligated to the Creditors to Make Payments Directly to Them.

The ancillary bill filed by the receiver's counsel does not allege that the receiver is entitled to collect the thirty per cent. On the contrary, the ancillary bill alleged that the $34,856.14 sought to be recovered therein was the aggregate sum "due from the said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors who have filed their claims, and which claims have been allowed by this court*" (R. 15, par. No. 4). Furthermore, the ancillary bill did not pray for an order that these sums be paid to the receiver. The prayer of the ancillary bill is that Dempsey, Drake and Buff be ordered to pay the same "to the clerk of the United States District Court." For whose benefit was the clerk to hold this money? The prayer of the ancillary bill says "for the use and benefit [a] of the receiver of the Monroe Stores, Inc. [b] the creditors of the receiver and [c] the creditors of The Monroe Stores, Inc." (R. 17 and 18, prayer No. 2.)

Again in the contempt petition, the receiver says expressly "* * * * said offer, in substance, provided that Harold A. Dempsey would *pay to the creditors* of The Monroe Stores, Inc., thirty per cent of the claims approved and allowed by this court" (R. 21, par. No. 3). After referring to the bond as having been given to secure the performance of said obligation to "*pay to the creditors,*" the receiver's contempt petition alleges as the breach of said obligation, the failure of Dempsey, Drake and Buff "to pay *to the creditors* of The Monroe Stores, Inc. thirty per cent of the amount of their claims." (R. 22, par. No. 9.) In another paragraph the contempt petition charges that Buff, and Drake "have been and now are attempting to avoid the payment of *their obligations to the creditors of The Monroe Stores, Inc.*" (R. 23, par. No. 13.) Furthermore, in referring in said petition to the attempts, by Buff and Drake, to buy the claims of creditors at fifteen cents on the dollar, the receiver alleges that said attempts were "in violation of their obligations in an agreement with this court *to pay said creditors* thirty cents on the dollar." (R. 23, par. No. 14.)

Moreover in the brief filed by the receiver in this court, he expressly admits that, for he says: "even though the obligation of the purchaser [Dempsey] under the terms of the offer runs directly to the individual creditors, as the respondent maintains * * * " (Petitioner's Brief p. 17).

The receiver himself has thus recognized and asserted that Dempsey, Drake and Buff were under obligation to the creditors to make payment directly to them.

It thus appears, not only by the terms of the offer, the performance of which the bond guaranteed, but also by the

positions taken by all concerned, including the District Court, the offeror and the sureties on the bond, and the receiver that the receiver was not to collect the thirty per cent payments on the creditors' proofs of claim, but that those payments were to be made by Dempsey, Drake and Buff directly to the respective creditors.

This direct obligation to the respondent as a creditor was one of the obligations which the bond is expressly "guaranteeing." It seems clear that as the beneficiary of Drake's and Buff's undertaking to guarantee that obligation, the respondent is in the same position as is a creditor in a probate estate with respect to the bond of the executor or administrator, or a creditor of a bankrupt estate with respect to the bond of the trustee in bankruptcy.

It has been held that suits upon bonds of trustees in bankruptcy and upon bonds of executors and administrators may be brought without leave of court.

Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278.
Alexander v. Union Surety & Guaranty Co., 85 N. Y. S. 282, 11 A. B. R. 32.
United States, ex rel., v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.).

2 Remington on Bankruptcy, 3rd Ed. Sec. 1090, p. 441 Remington says:

> "Suits upon trustee's bonds properly are brought in the name of the United States and no leave of court is necessary * * *. It has been held that such action may be brought in the United States District Court; also in the State court."

In *U. S. v. Ruggles, ubi supra*, the United States Circuit Court of Appeals, in a suit on a bond of a trustee in bankruptcy, says at p. 92:

"It has been held that it could be brought in the State court as well as in the Federal court."

In *Alexander v. Union Surety & Guaranty Co., ubi supra,* the New York court, in considering a similar case, says at p. 34:

"We have no doubt the action can be maintained in a State court, but only in the name of the United States. * * * Nor do we think it is necessary that permission be obtained to bring an action before one can be maintained under this statute, provided it be brought in the name of the United States."

In *Maryland v. Baldwin, ubi supra,* the United States Supreme Court, in a suit on an administrators' bond, says at p. 278:

"* * * the state is only a formal plaintiff, the actual litigation being between the other parties. By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

This language of the Supreme Court is fully applicable to the case at bar, for here also the bond was "held for the security of persons interested." In a suit on the bond, the name of the United States "is used from necessity," but "the real controversy" is between the respondent "and the obligors on the bond."

It therefore seems clear that there was no legal necessity for the respondent to obtain leave from the District

Court to sue on the bond. But if leave was necessary, it was obtained; and furthermore, the record shows that this was done "with his [the receiver's] knowledge," (R. 34, par. No. 3), and that he, at that time raised no objections and made no move to indicate that he claimed any right to interfere.

The receiver relies on the case of *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349; 27 S. Ct. 381. But that case has no bearing on the case at bar, for in the *Kenyon* case, as the majority opinion of the Circuit Court of Appeals points out, "the United States had an interest in the bond and was a real party plaintiff." (R. 72). There, the United States was itself a party to the contract for the construction of a public building, in pursuance to which contract the bond there in question was given. It was therefore financially interested in obtaining proper materials and labor for the erection of that building and the bond guaranteeing the payment of material men tended to assure a supply of such materials.

In the decision in the *Kenyon* case, Mr. Justice Harlan says at p. 356,

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government as involved in the construction of public works will be subserved, if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end, Congress may have deemed it important to assure those who furnished such materials and supplies that the Government would exert its power directly for their own protection."

The *Kenyon* case, therefore, has no bearing on the case at bar.

Likewise, the case of *Illinois Surety Co. v. United States,* 226 Fed. 665, also fails to lend any support to the receiver. In that case, the LaSalle Street Trust Co. and Savings Bank had filed a bond with the United States in the penal sum of fifty thousand dollars for the purpose of enabling the bank to act as depository of moneys of bankrupt estates. The bank became insolvent at a time when trustees in bankruptcy of various estates had deposits therein aggregating in amount in excess of one hundred sixty-five thousand dollars ($165,000.00). The Illinois Surety Co. was surety on the fifty thousand dollar ($50,000.00) bond filed by the bank. An action at law was brought by the United States for the use of certain trustees and receivers. It appeared clear that the penal sum of the bond was less than one-third of the aggregate claims thereon.

In the case at bar, however, the penal sum of the bond is one hundred thousand dollars ($100,000.00) and the aggregate of the obligations thereunder is less than thirty-five thousand dollars ($35,000.00). No question thus arises like the one that was presented in the *Illinois Surety Co.* case.

VI. AS THE RESPONDENT'S SUIT WAS MERELY TO ENFORCE AN OBLIGATION UNDER THE BOND, AND AS IT DID NOT INTERFERE WITH THE DISTRICT COURT'S PHYSICAL POSSESSION OF THE PAPER EVIDENCING THIS OBLIGATION, AND AS THE RECEIVER IS A STRANGER TO THE STATE COURT SUIT, HE HAS NO STANDING TO RAISE THE POINT AS TO WHETHER THE RESPONDENT HAD THE LEGAL RIGHT OR CAPACITY TO INSTITUTE A SUIT THEREON AGAINST DRAKE AND BUFF. IF THERE WERE MERIT TO THAT POINT, IT WAS OPEN TO DRAKE AND BUFF IN THEIR DEFENSE TO THE STATE COURT SUIT, BUT THEY DID NOT RAISE IT.

The physical paper called the bond is in the possession of the District Court. That paper is merely evidence of the obligations undertaken by Dempsey, Drake and Buff.

Sweetsir v. Chandler, 98 Me. 145 at 151.

The respondent's State court suit was to enforce one of the obligations evidenced by that paper. That suit did not interfere in any way with the District court's possession of that paper. The record shows that the respondent did not even have to introduce a copy thereof in evidence in the State court suit, for it appears that, in their answer in the State court suit, Drake and Buff expressly admitted "the giving of the bond". (R. 42). The record shows that the receiver does not even claim that the State court suit interfered in any way with the continued physical possession of the bond by the District court.

The receiver merely raises the point that Drake and Buff could not be held liable on their obligations under the bond except in a suit brought thereon by the receiver alone. Even if there were any merit to this point, it merely amounts to saying that Drake and Buff could interpose, on this ground, a successful defense to a suit brought by any other creditor to enforce their obligation under the bond.

But it is to be noted that this defence was not raised by Dempsey, Drake or Buff in the State court suit. The receiver is not a party to that suit, but a stranger thereto and he has no standing to raise this question. To permit a third party to raise in a separate proceeding a question as to the liability of a defendant in another suit, would certainly open up a new vista of possibilities for litigation without end.

The majority opinion of the Circuit Court of Appeals rightly says:

> "The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one *in personam* against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores." (R. 69).

The petitioner argues that the bond is a *res* and relies upon the case of *Dietzsch v. Huidekoper,* 103 U. S. 494 (Petitioner's brief, pp. 30-31). But in that case the bond was a replevin bond which is expressly conditioned on the return of the specific property and affects a *res.* Whereas in the case at bar the bond is purely a contract obligation for the payment of money. It is the same difference as that between a forthcoming bond in an attachment case and a bond to dissolve an attachment.

Smith v. Scott, 86 Ind. 346.

Ward v. Kent, 6 Lea (Tenn.) 128.

That a bond to dissolve an attachment is not the *res* nor a substitute therefor and has not the same incidents as attach to the property is well settled.

Carpenter v. Turrell, 100 Mass. 450.

Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 at 326.

Carpenter v. Turrell, ubi supra, was a case involving a bond to dissolve an attachment. In that case, Wells, J., says at p. 452,

> "The plaintiffs contend that the bond is a mere substitute for the attachment, and therefore that it should stand in all respects as its precise equivalent. But such is not the purpose of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment; it dissolves the attachment. It is, in many respects, a higher and better security for the creditor than the attachment. * * * The bond, although a substitute for the attachment, is not its equivalent, and has not its incidents."

Merely by virtue of being receiver, the petitioner cannot intercede himself into the issue as to the personal liability of Drake and Buff in the State Court suit.

In *U. S. Mortgage Co. v. Missouri Railway Co.,* 269 Fed. 497, the Circuit Court says at p. 501:

> "Where an attempt is made to take property out of his (receiver's) possession, then he is a proper party to litigation, and where relief is sought against 'his acts' as such receiver, he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. *Continental Trust Co. v. Toledo & C. Ry. Co.,* 82 Fed. 642, 646.
>
> The receiver does not represent the justiciable rights of the parties to the litigation of which he is the receiver, but only the protection of the property in his hands as such, or the collection of that to the possession of which, *as receiver,* he is entitled."

It is thus clear, as this decision says, that the receiver does not represent "the justiciable rights" of the respondent against Drake and Buff. He has no property in his hands, and is entitled only to receive from Drake and Buff his fees and receivership expenses. Other than that, the receiver has no standing or interest.

It is thus clear that there is no relationship between the receiver and the respondent, fiduciary, contractual or otherwise, and that the receiver is legally a stranger to the respondent, and to the State court proceedings.

VII. THE RECEIVER IS MERELY IN THE POSITION OF ANY OTHER CREDITOR OF DRAKE AND BUFF. AS SUCH CREDITOR, THE RECEIVER IS NOT ENTITLED TO ENJOIN SUITS AGAINST BUFF AND DRAKE BY OTHER CREDITORS.

The receiver is a beneficiary under the bond, only to the extent of the fees and the receivership debts which Dempsey, Drake and Buff obligated themselves to pay. That claim is based on a separate and distinct obligation, contained in a separate and distinct paragraph of the offer (R. 11, par. 2) from the obligation relating to the payment of the thirty per cent to the creditors (R. 10, par. 1). The creditors of Monroe Stores, Inc., have no interest in the receiver's fees or in the promised payments to extinguish obligations incurred by the receiver. A creditor could not maintain a suit against Dempsey, Drake and Buff for breach of that obligation. On the other hand, the receiver has no interest in the thirty per cent, which Dempsey obligated himself to pay directly to the creditors. To the extent of the thirty per cent of their approved claims, the creditors of Monroe Stores, Inc. became creditors of Dempsey and Drake and Buff under the bond filed for the purpose of guaranteeing the payment of those claims.

Being a stranger to the respondent and to his claim against Dempsey, Drake and Buff, and not being a party to the State court proceedings, and having no legal title or property right in any of the specific property of Drake and Buff sought to be reached and applied in those proceedings, the receiver is in the position of an unsecured creditor of Dempsey, Drake and Buff to the extent of his fees and receivership obligations which they became obligated to pay.

The receiver attempts to justify the injunction on the ground that the enforcements of the State court attachments might lessen the ability of Drake and Buff to pay his said claim. He made this the basis for his request for an injunction in the argument in the district court. He said:

> "If the Court permits the entry of the decree in the Superior Court it will handicap this Court in the administration of the receivership estate because we will have nothing to go against in order to enforce the decree of this Court as to the payment of the money except to put him in jail. I would rather have the money than put him in jail. That is my entire position in this case." (R. 52).

No evidence was introduced by the receiver in support of this claim that Drake and Buff did not have the financial ability to pay. The respondent vigorously denied this claim, and introduced the findings of the master that Drake and Buff had property worth many times the aggregate amount of all their obligations under the bond.

But even if the receiver's claim as to Drake and Buff's inability to pay could somehow be assumed to be true, in

the absence of evidence to support it, it is clear that it did not entitle the receiver to an injunction against this respondent.

McBride v. Little, 115 Mass. 308.
McGoldrick v. Slevin, 42 Ind. 522.
Victor v. Lewis, 53 N. Y. S. 944.

In *McBride v. Little, ubi supra*, the plaintiff brought a bill in equity to restrain Little from prosecuting to judgment a suit at law which the latter had brought against one Brooks. The bill alleged that the plaintiff was a creditor of Brooks for money loaned by him to enable Brooks to make a composition with his creditors, that Little was a creditor of Brooks and had accepted the dividend under the composition; that notwithstanding that acceptance, Little had brought suit against Brooks on the old indebtedness. Little demurred. The Massachusetts Supreme Court sustained the demurrer and said at p. 309,

> "If the plaintiff is a creditor of Brooks, this does not give him such an interest that he can enjoin a suit against Brooks. * * * *The mere fact that a judgment in a suit brought against a debtor will lessen his ability to pay his other debts, does not create in his other creditors such a legal interest as entitles them to be heard upon the questions involved in the suit or to enjoin its prosecution.*"

In *McGoldrick v. Slevin, ubi supra*, the plaintiff, a creditor of one McGoldrick, sought to enjoin certain other creditors of McGoldrick from levying on executions obtained by them against the debtor. The ground alleged for the injunction was in substance that McGoldrick would not be in financial condition to pay the plaintiff's claim and that the execution creditors would obtain preferences. The lower

court issued an injunction restraining the levy. The appellate court reversed the order, and said at p. 535:

> "There is no principle upon which the injunction against McFaddens, Ford, and Sheern can be sustained. They had obtained valid judgments, upon which executions had issued and been placed in the hands of the sheriff. These proceedings gave them a lien upon all the property of the judgment defendants, which was subject to such executions, and this lien was prior and paramount to the claims of the plaintiff in this action. The court possessed no power to enjoin them from having their executions levied."

It is therefore respectfully submitted that the receiver, having no title or legal right in the property of Drake and Buff which the respondent seeks to reach and apply, and never having had possession thereof, and not being a party to the State Court proceedings, he was in the position of a mere stranger and had no standing to entitle him to an injunction against this respondent.

VIII. THE DISTRICT COURT COULD NOT REVOKE THE LEAVE TO SUE.

The receiver contends that the District Court order permitting this respondent to sue did not amount to a final decree and that the District Court, therefore, had the power to revoke the permission. The respondent says that the permission of the District Court was not necessary but that if it was, the same having been given and having been acted upon, the District Court was without power to revoke it.

The only cases cited by the receiver in his brief fall into two classes and it is respectfully submitted that neither of them support his contention.

a. The first class of cases relied upon by the receiver are those where a court in which a suit was pending entered an order on a petition of a third person to intervene in that pending suit.

(Petitioner's Brief pp. 20 and 21.)

In our case, however, this respondent did not ask the District Court for permission to intervene in a suit pending in that court. He asked and obtained leave to begin in another court an entirely new and different proceeding. After the Federal court had entered the order authorizing this respondent to sue, there was nothing more remaining for that court to do or to consider with respect to the respondent's rights against Dempsey, Drake and Buff. The question whether the petitioner had or had not sufficient grounds for maintaining a suit as relator against Drake and Buff was then brought for decision in another court—the state court.

There is thus a great distinction between this situation in the case at bar and the situation in the cases cited by the receiver with respect to the granting of leave to intervene. The court that merely grants leave for a person to present his claims as an intervenor in a suit then pending before it, can hardly be said to be entering a final decree in favor of that party at that point of the mere commencement of the intervenor's litigation before that court. In such case, much more is asked of the court that permits the intervention. That very court is asked to hear and determine the intervenor's rights. It may turn out that the intervenor has no rights in the pending litigation. Hence, the order merely permitting intervention is not a final decree and the cases relied upon by the receiver are therefore not applicable.

The question is not whether an order is labelled "final decree," but whether it is final in character, as concluding a particular matter in pending litigation.

In *U. S. v. River Rouge Co.*, 269 U. S. 411, 46 S. Ct. 144, Mr. Justice Sanford clearly points out the distinction, as follows:

> **"It is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation."**

b. The second class of cases cited by the receiver, are cases where the Federal court permitted suits against its own receiver, as defendant, to be brought in the state court. (Petitioner's brief, pp. 22 and 23.) But in each of those cases, the Federal court held the *res* in which the plaintiff by the state court proceedings sought an interest through a judgment against the receiver. It is as though the stocks, real estate, mortgages and bank accounts of Buff and Drake which have been attached in the state court in the case at bar, had been previously in the hands of the Federal receiver. Under such circumstances, the cases cited by the receiver show that the Federal court could have revoked its leave to sue, because the judgment would affect property in its possession and under its control.

But it is clear that this is not the situation in the case at bar. Neither the District court nor the receiver ever had the property of Drake or Buff which has been attached. Hence, the second class of cases relied upon by the receiver do not apply, and it is respectfully submitted that the majority opinion of the Circuit Court of Appeals was right in

saying that the order granting leave to sue "could not be modified or revoked on December 7, 1931, after the term at which it was entered had expired" (R. 70).

IX. THE ORDER APPEALED FROM IS ERRONEOUS UNDER THE EQUITABLE PRINCIPLES OF LACHES AND ESTOPPEL.

Aside from the considerations of lack of jurisdiction on the part of the District Court and lack of legal standing or right on the part of the receiver to entitle him to the injunction, the respondent says that even if the receiver had had such a right, he would be barred from relief on well recognized principles of equity.

It appears that the respondent instituted the proceedings "after conferring with said receiver *and with his* knowledge" (R. 34, par. 3). Upon the filing of the bill in the State court, the respondent had, with due diligence, obtained preliminary injunctions restraining the transfer or incumbrance by Drake or Buff of certain shares of stock and mortgages, and also obtained attachments on certain bank accounts of Drake, and special attachments on certain real estate belonging to Drake which stood of record in the names of his various nominees (R. 36, par. 9, and pp. 47 and 48, par. 26). Before the receiver's counsel filed the ancillary bill on April 16, 1931, the respondent had thus gone to the trouble and expense of placing himself in a position to have the specific property, covered by said State court injunctions and attachments, reached and applied to the satisfaction of his claim.

On July 7, 1931, the receiver, having been called by the respondent, attended as a witness before the master in the

State court. Mr. Aldridge, one of the counsel for the receiver, was likewise called, and testified, as a witness (R. 34, par. No. 5). There is thus no doubt that they knew that the respondent was being put to the trouble and expense of a contest by Dempsey, Drake and Buff in the proceedings which the District Court had authorized this respondent to institute. But neither the receiver nor his counsel at that time made any objection to the respondent going forward. The receiver waited months thereafter while the respondent was battling before the master. He waited until after the motions to recommit and to reopen the case by an attempted amendment of the answer had been argued and disposed of, and until after the master's report was confirmed on the respondent's motion, and until after the case had become ripe for a final decree and a motion for the entry of such a decree had been filed by the respondent on November 13, 1931, and had been marked for hearing (R. 35, pars. 6 and 7). When Drake and Buff had exhausted their ingenuity in delaying the respondent and when they were facing the prospect of the prompt entry of a final decree, and when Dempsey, Drake and Buff thus seemed no longer able to postpone the day of reckoning with the respondent, whose claim had been admittedly overdue for months, it was then, namely, on November 27, 1931, that the receiver came to their rescue with his motion to stay the respondent (R. 27).

On this record, the respondent respectfully submits that, if the receiver ever had any right to interfere with the State court proceedings, he was guilty of laches by reason of his delay in attempting to exercise that right during all these months while the respondent was diligently pressing forward in those proceedings.

Furthermore, the principle of equitable estoppel applies, for the respondent had changed his position during this lapse of time. He had not only had the trouble of all this litigation, but it appears that he had incurred substantial expense for counsel fees and for other expenses incident to litigation (R. 36 and 37, par. No. 10). The attachments and injunctions which he has obtained in the State court suit have not been duplicated by the receiver in the Federal court proceedings, and it thus appears that the respondent will not and cannot be placed in anywhere near as good a position if he is merely left, at this time, to wait in uncertainty for nearly three years, while Drake and Buff leisurely pay the receiver's unsecured judgment at the rate of one thousand dollars per month, according to the mild order to which the receiver consented (R. 26 and 27).

McLearn vs. Hill, 1931 Mass. Adv. Sheets p. 1791.
Broitman v. Silver, 1932 Mass. Adv. Sh. 535.

In *Broitman v. Silver, ubi supra,* the plaintiff brought a writ of error to reverse a judgment entered for the defendant pursuant to a rescript of the Massachusetts Supreme Court, on the ground that the bill of exceptions filed by the defendant had not been allowed within the time set by law. The court speaking by Rugg, C. J., says at p. 536:

> "It is not necessary to discuss the merits of the points presented because the plaintiff is estopped to raise them at this time. Each and every fact now urged as constituting error was known to the plaintiff or his attorney at the moment it happened. If he had intended to rely upon any or all of them, ample opportunity as matter of law was open to him to present his contention seasonably. * * *

In *McLearn v. Hill, ubi supra,* the defendant, by conduct, led the plaintiff to believe that he would not rely upon

the statute of limitations as a defense to the plaintiff's cause of action. At a later stage, the defendant set up the statute of limitations in his answer, which would have been a good defense if the doctrine of estoppel had not intervened, but the court held that since he had misled the plaintiff to his detriment, he could not, therefore, set up the statute of limitations as a defense. The court said, by Rugg, C. J., at p. 1795,

> "It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law. It has been said that, 'In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow.'"

It is respectfully submitted that the same principles should apply in the case at bar, for the receiver, knowing of the State court suit, sat by and raised no objection to the respondent's continuing with the hearings before the master and going to the expense of employing counsel and incurring other expense of litigation.

X. NO EVIDENCE WAS INTRODUCED AT THE HEARING ON THE RECEIVER'S "MOTION" TO WARRANT THE INJUNCTION.

The motion was not under oath. It alleged as a ground for the injunction, as follows:

> "that if the said Louis Raphael is permitted to proceed further in said cause in the Superior Court in and for the County of Suffolk, Commonwealth of Mas-

sachusetts, the proper and orderly administration of the receivership in this court will be seriously interfered with" (R. 28).

This was not an allegation of fact, but a statement of an opinion or conclusion of the receiver. The sworn plea filed by the respondent met this allegation squarely by setting out specifically:

> "That said Drake and Buff are possessed of property of a value far in excess of the amount of their obligation to said Raphael and to the other creditors of said Monroe Stores, Inc. whose claims have been proved and allowed; that said Drake and Buff are therefore amply able forthwith to pay said obligation to said Raphael as they are in law bound to do, and that such payment to him will not interfere with the collection by any of said other creditors of the amounts due them" (R. 38, par. No. 15).

The respondent also introduced the master's findings as to the valuable property of which Drake and Buff were possessed, and those findings were summarized in the body of the plea. (R. 36, par. 8.)

The stenographic report of the hearing on the receiver's motion shows that the receiver introduced no evidence. (R. 51 to 59.) It was on this record, and in the absence of any evidence to support said allegation of the receiver's motion that the District Court issued the injunction against this respondent.

It is respectfully submitted that in the absence of evidence, the District Court could not deprive this respondent of the right to proceed with the State court suit, even if the District Court had had jurisdiction, and even if the

receiver had had the necessary legal standing and interest.

General Inv. Co. v. Lake Shore Ry., 260 U. S. 261; 43 S. Ct. 106 at 117.

Behne v. Anchor Insurance Co., 297 Fed. 986 at 989, C. C. A. 2nd.

Nottebaum v. Leckie, 31 Fed. (2) 556, at 560 (C. C. A.).

Clayton Act, 28 U. S. C. A. §381.

In *Nottebaum v. Leckie, ubi supra,* the Circuit Court held at p. 560:

"* * * * * The plaintiff, on whom rests the burden, must show to the court such facts as will justify a preliminary injunction."

XI. THE INJUNCTION WAS UNWARRANTED BECAUSE THE DISTRICT COURT LACKED JURISDICTION OVER THE RESPONDENT.

1. The respondent was not a resident or citizen of Massachusetts, but of New Britain, in the County of Hartford, in the State of Connecticut (R. 37, par. 13) and no personal service was made upon him. There was no compliance with the restraining order and order of notice, issued on November 30, 1931 against this respondent, which required "that notice be given to said Louis Raphael by said receiver by serving him with a copy of this order forthwith (R. 32). However, service was made on Mark Horblit without setting forth who the said Horblit was (Marshal's return, R. 32). This defence was specifically raised by the appellant's plea (R. 37, par. 13).

Where the order of notice requires "serving" on "him" it means personal service on the respondent and not on his agent.

U. S. S. C. Eq. Rule 13 (226 U. S. 652).
Flexner v. Farson, 248 U. S. 289, 39 S. Ct. 97.
United Drug Co. v. Cordley and Hayes, 239 Mass. 334. (Officer's return on agent.)

Service on the attorney for the respondent under Massachusetts General Laws, c. 227, §§2, 3 is not permissible because the parties in the State Court proceedings are not the same as those in the Federal Court.

Kimball v. Sweet, 170 Mass. 538, 539.
cf. *Young Co. v. McNeal Edwards Co.,* 283 U. S. 398, 51 S. Ct. 538.

2. The injunction issued by the District Court against this respondent was entered on a "motion" filed by the receiver as part of the case of *J. B. Hirshfeld & Co., Inc., et al. v. Monroe Stores, Inc.,* No. 3293, Eq. (R. 27). The respondent was not named as a party plaintiff or defendant in that case (R. 1 and 2, par. A). Nor did he ever become a party to that bill. While he had presented a proof of claim in the receivership, he had done so as the result of an order limiting the time for the proving of claims (R. 8, pars. 3 and 4). So far as the District Court was concerned, the allowance of the proof of claim constituted final judgment thereon. It was only for this purpose and to this extent that the District Court had jurisdiction by reason of the presentation of the proof of claim. It is respectfully submitted that it would be going a long way to hold that a creditor, who merely presents a proof of claim in an equity receivership in a District Court of the United States, thereby submits himself to its jurisdiction for purposes other than to have his claim allowed.

3. Nor did the filing of the petition for leave to sue submit the appellant to the jurisdiction of the District

Court for any purpose other than the limited one of obtaining the allowance of that petition.

Continental Trust Co. v. Toledo Ry. Co., 82 Fed. 642.

In that case, it was held by Taft, Cir. J., at p. 645,

> "* * * But care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the *res* acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect to the *res*, parties to the original are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof."

Conclusion.

It is therefore respectfully submitted that the majority of the Circuit Court of Appeals was right in reversing the injunction issued by the District Court.

Respectfully submitted,

MARK M. HORBLIT,
BENJAMIN GOLDMAN,
MAURICE H. HORBLIT,
Attorneys for the Respondent, Louis Raphael.

SUPREME COURT OF THE UNITED STATES.

No. 407.—October Term, 1932.

George B. Munroe, Receiver, Petitioner, *vs.* Louis Raphael.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 13, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

In an equity suit in the United States District Court against The Monroe Stores, Inc., the petitioner, Munroe, was appointed receiver. One Dempsey made a written offer to purchase the entire property, stipulating that he would pay the expenses of the receivership and thirty per cent. of all claims which might be filed by a certain date and allowed by the court, and, upon acceptance, give a bond in the penal sum of $100,000, with sureties, conditioned that he should perform the contract. The District Court authorized a sale to Dempsey on the terms set forth in his offer; the receiver conveyed all of the property in his possession and took a bond which bound Dempsey as principal and two sureties to the United States of America. It recited:

"The conditions of this obligation are such, that whereas, in Equity Case #3293, now pending in this District Court of the United States, District of Massachusetts, entitled J. B. Hirschfeld & Co. Inc. et als. *vs.* The Monroe Stores, Inc. Harold A. Dempsey made an offer in writing to purchase all of the assets of every name, nature, character, and kind and wheresoever situated, of George B. Munroe, Receiver of said The Monroe Stores Inc. as more fully set forth in said offer, and

"Whereas, in connection with said offer a bond guaranteeing the performance of the conditions and terms of said offer is required.

"Now, therefore, if the said Harold A. Dempsey shall comply with all the conditions and items of said offer then this obligation to be void, otherwise to be and remain in full force and effect."

Raphael, within the time limited by order of the District Court, proved his claim and the court allowed it for $35,000. After he

had been paid $1200, Dempsey defaulted and Raphael applied for and obtained leave of the District Court to sue Dempsey and his sureties on the bond in the state court. An attachment suit was brought in the name of the United States of America on the relation of respondent and property of the defendants seized which is still bound by the attachment. Shortly after this action was brought the petitioner, as receiver, instituted a suit on the bond by a supplementary bill in the District Court in the name of the United States and a final decree was entered therein against Dempsey and his sureties for $33,026, which was the amount due all creditors, including the respondent. An execution was returned unsatisfied. The petitioner then instituted proceedings in contempt against Dempsey and his sureties, and procured an order requiring them to pay $1,000 a month until the amount awarded should be paid in full. Thereafter the petitioner moved the District Court to rescind its prior order granting respondent leave to sue in the state court and to enjoin further proceedings therein, except the entry of judgment. At the time of this motion the suit in the state court was ripe for judgment. The District Court allowed the motion and granted the injunction. The Circuit Court of Appeals reversed the order. The case is here on certiorari.

The primary purpose of the receivership was to turn the Stores Company's assets to account for the equal benefit of all creditors. If the sale had been for cash, the consideration, after payment of necessary expenses, would have been ratably distributed. In parting with the property the receiver, as the court's representative, took a bond, running not to the creditors, but to the United States. Certainly no creditor could bring a suit in his own name on the bond, for his share of the purchase money. Nor could he institute such an action without leave of the District Court. The course the respondent pursued evidences his recognition of these limitations. Nevertheless the Circuit Court of Appeals held that the interest of the United States was merely nominal; that the cause of action on the bond belonged to the creditors as individuals; that by granting the respondent leave to sue in the state court the District Court lost jurisdiction; that its order permitting such suit was final and could not be revoked after the expiration of the term; and that the order of rescission and injunction violated section 265 of the Judicial Code (28 U. S. C., § 379) which forbids federal courts to enjoin prosecution of suits in state courts.

The petitioner supports the action of the District Court on the ground that the bond was to stand in place of the property conveyed, and was taken to enable the court through its receiver to insure the receipt and distribution of the purchase money amongst the creditors without preference or priority. He urges that when leave to sue was given the respondent the court evidently considered that such a suit would not interfere with ratable payment of all entitled to share in the assets, but that the grant was discretionary and subject to revocation if the interests of the creditors should so require. He says that the court never lost its jurisdiction over the estate, and the bond represented the estate for distribution.

We think this is the correct view of the matter. The District Court's order granting leave to respondent, a party in interest in the receivership, to sue upon the bond in the name of the United States, was not a relinquishment of its jurisdiction over him or the subject matter. The bond was given to an officer of the court for faithful performance of a contract with that officer. If at any time it was made to appear that the permitted suit by a single creditor might work an injustice to the others it was within the court's power to revoke the permission.

The parties refer us to decisions as to the right of action on statutory bonds given to the United States by contractors, providing, *inter alia*, for the payment of subcontractors and materialmen (*United States Fidelity & Guar. Co.* v. *Kenyon*, 204 U. S. 349; *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 223), or official bonds required by law (*Howard* v. *United States*, 184 U. S. 676). But these are not helpful in the present case. Here the outstanding fact is that the bond was taken by the court to protect all creditors. Any suit upon it must be in furtherance and not in contravention of that purpose.

Holding, as we do, that the manner of the enforcement of Dempsey's obligation remained within the control of the District Court, we conclude that the order which is the subject of the controversy was neither beyond its jurisdiction (compare *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229) nor an unlawful interference with the prosecution of a suit in a state court (compare *Richle* v. *Margolies*, 279 U. S. 218, 223).

The judgment must be reversed.

So ordered.

END OF CASE